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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

CHEVRON CHEMICAL COMPANY, A Delaware Corporation,
Petitioner,

vs.

HON. HORACE W. GILMORE, United States District Court Judge for the Eastern District of Michigan,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION, FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

I.

Whether a district judge (Respondent), in an otherwise properly removed action, should allow joinder of a nondiverse, nonindispensable party even though such joinder results in remand?

II.

Whether an order of remand predicated upon such joinder (which has not, in fact, been entered at the time of remand) is reviewable under *Thermtron Products Inc.* v. *Hermansdorfer*, 423 US 336 (1976) in this Court by mandamus?

III.

Whether a district judge's (Respondent's) *sua sponte* entry of a "sham" and "form" order of remand which recites the rubric of 28 USC §1447(c) but which, in fact, is predicated upon wholly different and unauthorized grounds, is reviewable in this Court by mandamus?

IV.

Whether 28 USC §1447(d) is to be read in conjunction with §§13 & 14 of the Judiciary Act of 1789, as ultimately consolidated into 28 USC §1651(a), so as to permit this Court to exercise its authority to supervise the arbitrary and capricious conduct of the inferior federal judiciary (Respondent), notwithstanding 28 USC §1447(d) and the fact that such conduct occurred in the context of remand proceedings?

V.

Whether 28 USC §1447(d), as read by the Court of Appeals to preclude exercise of mandamus jurisdiction to correct the otherwise arbitrary and capricious conduct of an inferior federal judge (Respondent) solely because such occurred in the remand context, constitutes an unconstitutional encroachment and limitation by Congress upon Article III functions of this Court?

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OCTOBER TERM, 1982

NO.

CHEVRON CHEMICAL COMPANY, A Delaware Corporation,
Petitioner,

vs.

HON. HORACE W. GILMORE, United States District Court Judge for the Eastern District of Michigan,
Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION, FOR WRIT OF MANDAMUS

Petitioner prays that a writ of *certiorari* issue to review the Order of the United States Court of Appeals for the Sixth Circuit, entered December 10, 1982, denying the Petitioner's Petition for a writ of mandamus; or in the alternative, Petitioner prays this Court issue a writ of mandamus to the United States Court of Appeals for the Sixth Circuit compelling it to direct the Respondent to vacate the Order of Remand

[1] As required by Rule 21.1(b) the following gives a history of this case and lists all the parties. In the United States District Court For The Eastern District Of Michigan, the matter was captioned *Marie E. Munn & George E. Munn, Plaintiffs* v *Chevron Chemical Company, Defendant*, Civil Action No. 81-70555. When mandamus review was sought in the United States Court of Appeals for the Sixth Circuit that matter was captioned, as required by Sixth Cir. R. 23, *In re: Chevron Chemical Company, Petitioner*, Case No. 82-8063.

The Munns, Plaintiffs below and (real) Respondents herein, are Michigan citizens. Mr. George Munn is deceased.

Also pursuant to Rule 28.1, Supreme Court Rules, Petitoner Chevron Chemical Company is a Delaware Corporation and is wholly owned by Standard Oil Company of California, a Delaware Corporation. There are a number of affiliate corporations, each including "Chevron" in their company name and all of which are wholly owned by Standard Oil Company of California.

entered by him dated September 27, 1982, or, in the further alternative, to issue a writ of mandamus directly to the Respondent compelling him to vacate said Order.

RULE 28, RULES OF THE SUPREME COURT

Notice is hereby given that 28 USC 2403(a) may be applicable. To the best of Petitioner's knowledge, no court has certified to the Attorney General the fact that the constitutionality of 28 USC §1447(d) has been drawn in question.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit dated December 10, 1982 denying Petitioner's Petition for Writ of Mandamus is unreported and appears in the Appendix, pp. 1a-3a. The Ruling and the Order of the United States District Court for the Eastern District of Michigan remanding the action styled *Maria E. Munn and George E. Munn* v *Chevron Chemical Company*, No. 81-70555, to Wayne County (Michigan) Circuit Court are set forth, respectively, in the Appendix hereto, pp. 3a-6a.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on December 10, 1982. The Jurisdiction of this Court is invoked pursuant to 28 USC §1254(1), or, alternatively, pursuant to 28 USC §1651(a).[2]

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[2] Where a Court of Appeals has denied a petition for a writ of mandamus to review an improper Order of Remand as is involved here, this Court has elected to review the same under its statutory *certiorari* jurisdiction over the Courts of Appeals, 28 USC §1254(1). *See Petition for Writ of Certiorari, Thermtrom Products, Inc.* v *Hermansdorfer*, at 2; *Thermtrom Products, Inc.* v *Hermansdorfer*, 420 US 923 (1975) (*certiorari* granted); *Thermtrom Products, Inc.* v *Hermansdorfer*, 423 US 336 (1976). In fact, this appears to be the preferred procedural avenue of review, *see* 9 *Moore's Federal Practice* ¶110.27. However, there is nothing precluding this Court from reviewing such a matter on an original petition in this Court for mandamus pursuant to 28 USC §1651 (a) or otherwise, in the event this Court elected to use that jurisdictional avenue and/or if review was otherwise precluded.

If the Court elects to assume jurisdiction over this matter as a Petition for an extraordinary writ in the nature of mandamus under the All Writs

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

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All of the above referenced Statutes can be found in the Appendix as permitted by Rule 21.1(f).

STATEMENT OF THE CASE

On February 13, 1981, Plaintiffs, GEORGE E. MUNN and MARIE E. MUNN, (hereinafter PLAINTIFFS) citizens of Michigan, commenced an action against Defendant CHEVRON CHEMICAL COMPANY, a Delaware Corporation with its principal place of business in California (hereinafter PETITIONER), in Michigan's Wayne County Circuit Court. The Complaint alleged that Petitioner had defectively manufactured a product which caused GEORGE E. MUNN to contract a terminal carcinoma (and also caused a consequential loss of consortium to MARIE E. MUNN), resulting in damages in excess of ten thousand ($10,000.00) dollars. On February 20, 1981, Petitioner filed a timely Petition for Removal in

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Act, 28 USC §1651(a) or otherwise, as opposed to a Petition for statutory *certiorari*, then, pursuant to Rule 27.1 of this Court, this action should be captioned *In re: Chevron Chemical Company*. Also, if the Court elects to so proceed, an actual Petition is included in the Appendix hereto, pp. 66a-67a, as required by Rule 27.2(a). That Petition incorporates, by reference, the same grounds for issuance of that writ as those that this Petition assert as grounds for issuance of a writ of *certiorari*. Rule 27.2(b).

compliance with 28 USC §§1441 & 1446, in the United States District Court for the Eastern District of Michigan because the action was one that could have been commenced there originally. Petitioners posted a bond and took all other steps necessary to insure proper removal in a timely fashion, as required by 28 USC §1446. Neither the Plaintiffs nor the District Court ever questioned or challenged the removal as being anything but wholly proper. Furthermore, it is uncontroverted that the District Court recognized, assumed and exercised jurisdiction over the case, there being no jurisdictional defects regarding the removal.

After having been assigned to first one District Judge and then another, on September 21, 1982 (19 months after commencement of the action) a motion was made to Amend the Complaint and add, as a Defendant, DOW CHEMICAL COMPANY, a Michigan Corporation. On the same day, the Judge to whom the case was then assigned, disqualified himself on the basis of stock ownership in DOW and the matter was immediately reassigned to the Honorable Horace W. Gilmore, (hereafter RESPONDENT).

On the following day, September 22, 1982, counsel for Petitioner was orally notified that he was compelled to appear, within twenty-four hours (i.e. on September 23, 1982), at a Remand Hearing. On the eve of the trial and at that hearing, the Respondent rejected arguments relative to his lack of authority to add a nonindispensable party (although he acknowledged that this characterization was not incorrect, Appendix p. 5a) and to remand, and focused in upon the "equities" favoring remand. More important than what was argued to, and rejected by Respondent is a purview of the arguments counsel could *not* make simply because of the truncated nature of the proceedings.[3] Correlatively, these arguments — especially the

[3]For example, Petitioner did not have an adequate opportunity to prepare or even file written memoranda in opposition, nor to demonstrate that the very relief sought by Plaintiffs was precluded by Judge Cohn's Order requiring the addition of parties *by September 1, 1982*. He was not able to present substantial authority to the effect that a District Court has no

ones touching upon the history of the case — demonstrate that there was no way Respondent could have possibly familiarized himself with the matter in one day.

Never-the-less, the Court elected to rule immediately, stating the issue was whether to allow the amendment to add Dow and that if the Amendment was allowed, "it destroys diversity and the case would automatically be remanded to Wayne Circuit Court." In a one and one-half page Opinion, Respondent extracted from and focused upon language in a Moore's Federal Practice citation, ruling that he felt there were "strong equities" favoring amendment so that a proper fact finder could make a determination with everyone in front of it. Respondent then granted the Amendment and stated "I will remand the case to the Wayne County Circuit Court." Re-

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discretion to grant an amendment under such circumstances; or that Petitioner could well be left without any remedy to correct the Respondent's abbreviated approach to the motions, given the general prohibition of review of remand orders found in 28 USC §1447(d); or that complex and difficult questions regarding the limited circumstances in which remand is appropriate under 28 U.S.C. §1447(c) are implicated by the case.

There was no opportunity to present arguments regarding the gross inadequacy of the motions to demonstrate particularly how Dow was implicated; as they merely asserted that "Dow *could* be involved in the litigation." These motions also did not specify the nature or identity of the mysterious carcinogenic substance or its relationship to Petitioner's products, or the names, dates and specific testimony of the witness(es) who allegedly triggered counsel's fancy to pursue Dow. Additionally, there was no opportunity to establish that, by admission in their own pleadings, *Plaintiffs' acknowledged a thoroughly wrongfull purpose for their discovery efforts against Petitioner-to seek out new Defendants and bravely go where the Rules do not permit litigants to travel!* Further, Petitioner was unable to establish that a proposed Amended Complaint had not been attached to the Motion.

Moreover, because the Respondent acted with such haste, Petitioner was unable to point to authority warning District Judges to be aware of collusive efforts by Plaintiffs to obtain Remands back to their formerly selected forum; or to argue that the delay inherent in a remand to Wayne Circuit, should be seriously considered by Respondent because the very purpose for the general prohibition against review of remand orders, i.e., to avoid delays, is foiled under such circumstances. Finally, Petitioner was unable to present arguments that explicit language in Fed. R. Civ. P. 19(a) forbids addition of even an indispensable party whose presence destroys diversity jurisdiction but rather only permits the Court to determine whether to continue with the action without the party or to dismiss the action as provided for in Fed. R. Civ. P. 19(b).

spondent neither cited the remand statute, nor did he purport to act pursuant to it, nor did he attempt to enumerate grounds remotely resembling the standard for remand, i.e., that the case was originally removed improvidently and without jurisdiction. 28 USC §1447(c).

Petitioner had intended on contesting, in presentment of order proceedings, any proposed order from Plaintiffs' counsel which did not exactly conform to the Petitioner's September 23, 1982 Opinion and Ruling.[4] However, Petitioner was once again foiled by Respondent's unorthodox abridgements of the normal adversarial processes. Apparently, in an effort to get the matter removed from the docket with all possible haste, (and Petitioner must infer the intent was to accomplish this by the end of the month of September, at which time Respondent was required to file a monthly report with the Dir. Admin. Office of the U.S. Courts, 28 USC §604(a)(2)) Respondent did not wait for a proposed order from Plaintiffs' counsel — much less the conclusion of presentment proceedings.

Rather, on September 27, 1982, Respondent, *on his own Motion*, entered a "form" order of Remand to Wayne County Circuit Court to which the words "lacking total diversity" were added after the form's standard language regarding absence of jurisdiction. This Order in no way reflects the content of Respondent's consideration and Opinion of September 23, 1982 regarding Amendment and Remand.[5] Moreover, at the

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[4] Petitioner wanted to proceed in such a fashion because of the importance the content of such order bears upon any attempt to obtain relief from it in the Court of Appeals or in this Court. Moreover, Petitioner was entitled to present Respondent with those arguments and emphasizes that it was forestalled from making by the truncation of the proceedings prior to the signing of the order.

[5] The Order states the "case was improvidently removed" but there was absolutely *nothing* in the Opinion (or in the entire record of the case) to even intimate that Respondent ever considered the improvidence of removal, either relative to the time the case was removed or at any other time! Similarly, the Order states that "there is no federal jurisdiction . . . lacking total diversity" but the Opinion no where discussed or even mentioned the word jurisdiction; Respondent simply said that *if* he permitted the Amendment diversity would be destroyed and the case would automatically be

time the Order was entered *no Order Granting the Amendment had been entered (n[illegible] has any such order ever been entered) and, therefore, the nondiverse party was not before the Court.*

On October 15, 1982, Petitioner being without any appellate remedy, sought extraordinary relief in the United States Court of Appeals for the Sixth Circuit, by filing a Petition for Writ of Mandamus praying that the Respondent be compelled to Vacate the Order of Remand. That Petition with the Statement of Reasons Why the Writ should Issue are set forth in the Appendix hereto, pp. 14a-59a. The contentions made in the Court of Appeals fell into three (3) major categories: 1) remand based upon the addition, after removal, of a nondiverse, nonindespensable party in view of "strong equities" is a ground not permitted by, and affirmatively predicated upon grounds wholly different from those described in 28 USC §1447(c), and, therefore, is reviewable and should be vacated by mandamus; 2) the "form" order actually entered by Respondent was a "sham" not reflecting either the content, tenor, or substance of the ruling of September 23, 1982 and, therefore, was reviewable and should be vacated by mandamus; and 3) the conduct of the Respondent in his remanding of the matter deprived Petitioner of due process regarding its right to a federal forum. Therefore, the Order of Remand predicated upon such conduct was reviewable and should be vacated by mandamus, without regard to whether or not such an Order was otherwise unreviewable.

On October 22, 1982, Respondent filed a Response in Opposition to the Petition. Plaintiffs filed their Response in Opposition to the Petition on December 8, 1982. These Responses in Opposition are set forth, respectively, in the Appendix hereto, pp. 60a-62a, pp. 62a-65a. On December 10, 1982, the Court of Appeals

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remanded. The only items really discussed in relation to remand are totally absent from the Order; to-wit, there is no mention therein that "strong equities" favored the amendment nor of the discussion regarding Dow not being an indispensable party nor of the finding that, in any event, there was no need to show such to grant the amendment.

entered an Order Denying The Petition because it had no jurisdiction to review the Remand Order, "once the nondiverse party was added" (*although no order was ever entered adding the nondiverse party*).

REASONS WHY THE WRIT SHOULD ISSUE

INTRODUCTION

As already noted, the Petitioner has no appellate right of review of the Remand Order entered by Respondent. Moreover, 28 USC §1447(d) would appear to preclude all review by mandamus under the All Writs Act, 28 USC §1651(a), or otherwise. However, as argued, *infra*, in this Petition, and in the Court of Appeals Appendix, pp. 35a-54a, Petitioner asserts that the peculiar procedural manner in which this case comes to the Court in conjunction with *Thermtron Products Inc.* v *Hermansdorfer*, 423 US 336 (1976), renders the remand order reviewable as within the mandamus jurisdiction and prerogative process of this Court.

Further, even should this Court elect to ultimately deny issuance of a writ of mandamus, both the jurisdictional and substantive questions presented are in and of themselves of such significance as to warrant issuing a writ of *certiorari* for a full consideration on the merits. Indeed, the jurisdictional questions are of such moment — particularly those relative to the unique place and powers the Constitution delegates to this Court — as to warrant a consideration on the merits even if they are answered in the negative. Moreover, there is a substantial conflict among the Circuit Courts of Appeals relative to the underlying substantive question (Question I) of whether or not, in an otherwise properly removed action, a nondiverse, nonindispensable party may be added to defeat diversity and whether or not remand based thereon is permitted under 28 USC §1447(c). Only this Court can resolve that conflict.

I.

The Joinder, in Properly Removed Action, of a Nondiverse, Nonindispensable Party Whose Presence Defeats

Diversity and An Order of Remand Based on Such Joinder Constitutes a Nondiscretionary Erroneous Act Which Calls For This Court to Exercise Its Power of Supervision Over Respondent and Over the Court of Appeals for Sanctioning His Conduct.

The underlying substantive question in the matter here presented is of such great significance to both a harmonious federalism and a consistent application of federal procedure that it is first addressed.

May a District Judge in an otherwise properly removed action, order joinder of a nondiverse, nonindispensable party and then remand the action based upon such joinder?

The removal statute, 28 USC §1447(c), provides that an action can be remanded only when "it appears that the case was removed improvidently and without jurisdiction, . . ." Due to the general unreviewability of remand orders in the Courts of Appeals, however, the state of the law as to what this language means and under what circumstances remand is or is not appropriate has to be, at best, balkanized. At the very worst, it is submitted, experience teaches that District Judges solipsistically remand cases, irrespective of statutory grounds, for judicial "housekeeping" or other reasons they may deem appropriate, being sure only to 'cover their tracks' by couching their remand orders in terms of 'the improvidence of removal and the lack of jurisdiction.'

Because this Court has never addressed the question presented nor provided a detailed construction of 28 USC §1447(c) (except to articulate that remand for docket control is not permitted *see Thermtron Products Inc.* v *Hermansdorfer,* 423 US 336) and because the Courts of Appeals are generally unable to address the removal statute in view of the proscriptions of 28 USC §1447(d), it is all the more compelling that this Court grant this petition for *certiorari* and conclusively resolve the problem for the entire federal system. The question eludes review, and if the Court avoids it in this matter, the ensuing disharmony in the precedents and the federal system will continue indefinitely. Even if this Court were to rule that it

had no jurisdiction to review the question, *ipse dixit* regarding the proper construction and application of the remand statute relative to the addition of parties or otherwise, would at least provide the lower federal judiciary with a workable standard relative to remand. The vast majority of District Judges must surely welcome such direction. As things stand now, however, there is not even uniformity of precedents within the Circuits, much less a national standard for remand or a uniform construction of §1447(c).[6] Only this Court can alleviate these incongruities and difficulties by granting *certiorari*.

From the early days of the Republic, one of the cornerstones of our federal judicial system has been the principle that once federal court jurisdiction attaches, the litigants cannot, by subsequent acts (nor can subsequent events of their own force) oust that jurisdiction, whether such arose originally or by virtue of removal. *See Mollane* v *Torrance*, 22 US (9 Wheat) 537 (1824). Correlatively, the critical time frame for measuring the propriety of removal from state court and the existence of federal court jurisdiction under 28 USC §1447 has been *the time of the filing of the removal petition;* subsequent events deemed irrelevant. *See Saint Paul Mercury Indemn. Co.* v *Red Bar Cab Co.*, 303 US (1938); *Mansfield, Coldwater & Lake Mich. Ry* v *Swan*, 111 US 379 (1884); *Hart & Weschler, The Federal Courts & The Federal System* 1062, 1218 (2d ed 1973).

Nevertheless, and despite the fact that the Sixth Circuit has explicitly recognized this principle, *Television Recpt. Corp.* v *Dunkan*, 426 F2d 174, 177 (6th Cir 1970), the Respondent ordered the remand *wholly* based upon events *subsequent* to removal; events (i.e. the joinder of the nondiverse, nonindispensable party) he affirmatively ordered! In view of such a nondiscretionary act departing from this long line of established precedents, this Court should grant the writ of *certiorari*, review the case upon the merits and then exercise its supervisory powers over the Respondent and over the Court of

[6] Compare and contrast the authorities cited in notes 10-11 *infra*.

Appeals for sanctioning this departure from such authorities.[7]

There appears, however, to be one contemporary opinion from a Court of Appeals in conformance with the position taken by the Respondent (although not cited by him), notwithstanding the decisions of this Court rendering the time of removal as the universal benchmark for determining jurisdiction. *Desert Emp. Bank* v *Insurance Co. Of No. Am.*, 623 F2d 1371, 1376 (9th Cir 1980) That decision and the position of the Respondent as sustained by the Sixth Circuit, when compared with the overwhelming majority of decisions of the Circuit Courts bearing upon the point to the contrary, creates a conflict as to the application of the principle in the context of the joinder of nondiverse parties. *Compare In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642, 647 n8 (5th Cir. 1978); *Chiodo* v *General Waterworks Corp.*, 380 F2d 860, 867 (10th Cir 1967); *Reynolds* v *Wabash R.R. Co.*, 236 F2d 387 (8th Cir 1956). Only this Court can resolve this conflict.

Additionally, the Congress and this Court, while performing their rulemaking functions, 28 USC §2071, have given life to this universal principle of measuring removal jurisdiction and propriety at the time the petition for removal is filed, as it

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[7] It must be emphasized that the clear conjunctive language of 28 USC §1447(c) would appear to require *both* improvident removal *and* removal without jurisdiction. *See Sheet Metal Worker's Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000, 1005 & nn7-8 (10th Cir. 1982). Nevertheless, the Fifth Circuit has apparently elected to read this language in the disjunctive, *Robertson* v *Ball*, 534 F2d 63, 65 n2 (5th Cir 1975), but even then narrowly construes "improvidently" to mean procedurally defective. *In re Merrimack Mut Fire Ins Co*, 587 F2d 642, 645 n3 (5th Cir 1978).

In the instant matter, remand was predicated upon joinder - long after removal - of a nondiverse, nonindispensable party because "strong equities" favored having everyone before the same trier of fact. Although Petitioner has vehemently contested below the remand being characterized as one based on lack of jurisdiction (see Appendix pp. 36a-37a) — jurisdiction indisputably existing at the time of removal, and because the order' granting the amendment to add the nondiverse party was *never* entered — nevertheless, there was *never* any question of or discussion regarding the improvidence of removal. The Respondent's unarticulated reading of §1447(c), therefore, was necessarily in the disjunctive, and presents this Court with the opportunity to resolve a split among and between the Circuits and a reading of an Act of Congress by Courts of Appeals contrary to its plain and obvious meaning.

relates to the joinder, subsequent to proper removal, of nondiverse parties. 28 USC Rule 19(a) *forbids* the joinder of even an indispensable party, only permitting, under 28 USC Rule 19(b), the court to dismiss the case or to continue on without the nondiverse party. Application of this principle of jurisdictional preservation is at its zenith when a nondiverse, nonindispensable party is sought to be added under 28 USC Rule 21.

Notwithstanding this clear mandate, however, Respondent here ruled that the nondiverse, nonindispensable party must be added in view of "strong equities." Neither the rules nor the remand statute authorize such discretionary grounds for either adding a party whose presence destroys federal jurisdiction or a remand base thereon. Indeed, this Court has recently reiterated that "it is axiomatic that the Federal Rules of Civil Procedure do not create or *withdraw* federal jurisdiction . . ." *Owens Equip & Er. Co.* v *Kroger*, 437 US 365, 370 (1978) (emphasis supplied).

Moreover, 28 USC §1447(c) must be read in conjunction with 28 USC Rule 19, 20 & 21 to determine that such a remand is not thereby contemplated. The vast majority of the Circuit Courts of Appeals and District Courts that have addressed these problems have ruled that a nondiverse party cannot be joined and neither can a case be remanded based upon such joinder. Only if the party is indispensable and the action cannot proceed without that party will federal jurisdiction be destroyed — and only then by *dismissal*.[8] There is, however, one Court of Appeals decision that authorizes such a joinder and remand.[9] This, in conjunction with the position adopted by the Respondent and as *sub silentio* sustained by the Sixth Circuit, evidences a serious circuit split that only this Court can resolve.

Correlatively, regardless of whether viewed as a matter of rule and/or statutory construction or as an application of the universal principle that subsequent events cannot oust or alter removal jurisdiction, the vast majority of lower federal courts

[8] *See* note 10 *infra*.

[9] *See* note 11 *infra*.

that have addressed the question have held that a District Court cannot add a nondiverse, nonindispensable party to an otherwise properly removed action and then remand.[10] There

[10] The majority of Federal District Courts and Circuit Courts of Appeals having addressed the question have held that after a proper removal (as determined at the time of removal), the District Court has no discretion (and/or that it is improper) to add a nondiverse, nonindispensable party and then remand. *See, e.g., IMFC Prof* v *Latin Am. Home Health*, 676 F2d 152, 159 n14 (5th Cir 1982) (issue should be squarely addressed); *In re Merrimack Mut Fire Ins. Co.*, 587 F2d at 647 n8; *Chiodo* v *General Waterworks Corp.*, 380F2d 860, 867 (10th Cir 1967) (even indispensable party cannot be joined if it would destroy the jurisdiction of the court and if indispensable party cannot be joined court should dismiss action); *Reynolds* v *Wabash R.R. Co.*, 236 F2d 387 (8th Cir 1956) (no power in federal district judge to add nondiverse party whose presence would destroy jurisdiction); *Wallace* v *Knapp-Monarch Co.*, 234 F2d 853, 860 (8th Cir 1956) (Court affirms trial court refusal to add nondiverse party citing *Red Cab Co.* but there is dicta that the power to amend is discretionary); *Thorp* v *Petrola*, 81 F.R.D. 513, 515-16 (N.D. W. Va 1979) (nondiverse, nonindispensable parties cannot be added nor can nondiverse, indispensable parties be added; construction of explicit language of Rule 19, 20 and 21 control over Rule 15; "if the court were to allow the adding or dropping of parties pursuant to a motion under Rule 15, which would deprive the court of subject matter jurisdiction, the policy of Rules 19, 20, and 21 would be emasculated merely by ignoring it"); *Skinner* v *American Oil Co.*, 470 F Supp 229, 235 & n2 (S.D. Iowa 1979) (attempt to join nondiverse Defendant following remand irrelevant for purpose of determining whether to remand; indeed, because of Rule 19 improper to add such a Defendant); *Perimeter Lighting Inc.* v *Karlton*, 456 F Supp 355, 359-60 (N.D. Ga. 1978) (removability determined at the time of filing the removal petition and acknowledges authority prohibiting amendment of nondiverse party after proper removal); *Barrett* v *McDonald's Of Okla. City*, 419 F Supp 792, 793 (W.D. Oklahoma 1976) (Court should ignore addition of nondiverse party by Plaintiff because removal is viewed at time removal petitoin is filed); *Harper Fin. Corp.* v *Hanson Oil Corp.*, 403 F Supp 1405, 1407 (W.D. Tenn. 1975) (amendment not permitted to add nondiverse Defendant unless amendment also substantially alters the very nature of the cause of action); *Fort Howard Paper Co.* v *Affiliated F.M. Ins. Co.*, 60 F.R.D. 62, 63-64 (E.D. Wis. 1973) (Court must protect Defendant's right to removal and not allow amendment to include parties whose presence could oust the Court of jurisdiction); *Alexander* v *Lancaster*, 330 F Supp 341, 343 (W.D. La. 1971) (attempts to join any nondiverse party after proper removal irrelevant to remand-must view diversity only at time of removal); *Checker Motors Corp.* v *Chrysler Corp.*, 39 F.R.D. 37, 38 (S.D. N.Y. 1965) (to bring in parties by amendment, Rule 13(b) requires that their presence not defeat the Court's jurisdiction); *Pacific Gas & Elec. Co.* v *Fireboard Prod. Inc.*, 116 F Supp 377 (N.D. Cal. 1953) (removal's propriety determined at time of removal and any conflict in Rule 15 regarding amendment must be considered with specific language in other rules precluding destruction of jurisdiction;

appear to be, however, a few opinions to the contrary.[11] This

remand to add nondiverse party not allowed). *See also Television Recpt Corp.* v *Dunkan*, 426 F2d 174, 177 (6th Cir 1970) (federal removal jurisdiction not defeated by events occurring subsequent to commencement of action).

[11] There are authorities subsequent to *Thermtron (see* this footnote *infra)* that have held that under some circumstances remand subsequent to removal by virtue of the addition of nondiverse parties is appropriate. Petitioner submits these authorities are clearly erroneous in view of the fact that *Thermtron* itself forbids discretionary remand and because none really deal with the explicit language of Congressionally mandated policy expressed in 28 USC Rule 19, 20 & 21. Indeed, it would appear that explicit language in Rule 19 regarding indispensable parties states they cannot be added if their presence would "deprive the Court of jurisdiction over the subject matter." The only thing the District Court can do is dismiss the action. *Skinner* v *American Oil Co.*, 470 F Supp 229, 233-34 (S.D. Iowa 1979).

Notwithstanding this, however, the contra authorities (*see* this footnote *infra*) are thoroughly inapposite here because, first, the Respondent did not make even the slightest intimation that he was referring to or relying upon them. Second, the Respondent explicitly relied upon the discretionary ground that "strong equities" required joinder, while none of the contra authorities has *ever* articulated such a discretionary and nonstatutory ground for remand without a thorough weighing of the adverse jurisdictional effects, contra authorities, and the possibility of collusive jurisdiction. Third, most of the courts permitting remand have not discussed the indispensable/dispensable distinction; Respondent here, by contrast, stated that Dow was not indispensable (and/or that that distinction was irrelevant). *Soam Corp.* v *Trame Co.*, 506 F Supp 302 (S.D. N.Y. 1980); *Littlefickl* v *CNA, 475 F Supp 887 (C.D. Cal. 1979); Miller* v *Davis*, 464 F Supp 458 (D.D.C. 1979); *Ingersoll* v *Pearl Assum. Co.*, 153 F Supp 558 (N.D. Cal. 1957); *Highway Constr.* v *McClelland*, 15 F2d 187 (8th Cir 1926) (decided under different rules of procedure). Fourth, some of the Courts have said an amendment that defeats diversity should not be granted unless it also contemplates a substantial alteration of the nature of the cause of action-something clearly not involved here. *Miller* v *Davis*, 464 F Supp 458, 460 (D.C.C. 1978); *Harper Finc. Corp.* v *Hanson Oil Co.*, 403 F Supp 1405, 1407 (W.D. Tenn. 1975).

Finally, the few courts which have erroneously allowed the permissive joinder of a nondiverse, nonindispensable party have explicitly predicated their exercise of such *discretionary* power upon a very careful consideration of whether the requested amendment is but a collusive means of obtaining return to the forum formerly selected by Plaintiff. *Desert Emp. Bank* v *Insurance Co. Of No. Am.*, 623 F2d 1371, 1376 (9th Cir 1980); *Shaw* v *Mumford*, 526 F Supp 1209, 1215 (S.D. N.Y. 1981). There is absolutely nothing in this record to establish that Respondent considered such important factors. Therefore, even under application of these authorities which Petitioner contents are erroneous — authorities of which the District Court was totally unaware — Respondent's actions are not only erroneous, but clearly abusive of discretion.

alone warrants review by this Court since the Circuits have reached different results for at least twenty five (25) years. Moreover, assuming *arguendo* the few opinions supportive of Respondent's ordering joinder are correct, none supports his rationale (or lack thereof).[12] Rather, like Judge Hermansdorfer in *Thermtron*, Respondent completely ignored his affirmative duty to remand only for reasons authorized by the statute. The unprecedented remanding of the case for "equitable reasons" calls for this Court to exercise its supervisory powers over the Respondent and over the Court of Appeals for not correcting this clear abandonment of duty and abuse of discretion. *See Sheet Metal Worker's Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000 (10th Cir 1982) (court issues a writ of mandamus to vacate remand granted because it was more "equitable" for Plaintiff to be in state court due to federal limitation upon remedies).

II.

This Court Has Never Considered Whether a Remand Predicated Upon Joinder, In an Otherwise Properly Removed Action, of a Nondiverse, Nonindispensable Party Whose Presence Defeats Diversity, is Reviewable in this Court or in the Court of Appeals by Mandamus. Moreover, the Question Presents this Court with an Opportunity to Clarify Earlier Opinions.

This Court has never squarely addressed the question of whether an order of remand based upon the joinder of a nondiverse, nonindispensable party is reviewable by mandamus, either here or in the Court of Appeals. All of the reasons asserted relative to the need for the Court to grant *certiorari* and resolve the merits of the question of whether such joinder is permissible are reasserted to establish the need to grant *certiorari* to resolve the antecedent jurisdictional question of whether or not the remand order can be reviewed and vacated by mandamus.

In *Thermtron Products*, this Court construed 28 USC §1447(d) in *pari materia* with 28 USC §1447(c), and concluded "that

[12] *See* narrative in note 11 *supra* relative to the comparison of the precedents therein cited, with Respondent's ruling.

only remand orders issued under §1447(c) invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under §1447(d)." *Id.* at 346. Reviewability under *Thermtron*, therefore, necessarily reverts back to an inquiry into the merits of whether the remand is proper under, or authorized by §1447(c). In fact it was specifically noted that,

> We are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

Id. at 351.

Such language is clearly apposite here. For the Respondent, without even a recitation of the statute or mention of the grounds permitting remand therein, concluded in his ruling, that "strong equities" favored joinder of a nondiverse, nonindispensable party — grounds wholly unrelated to those recognized by 28 USC §1447(c) but apparently justifiable to him. The Fifth Circuit Court of Appeals has recognized that such joinder of a party constitutes an improper ground for remand warranting vacation by mandamus.[13]

Moreover, there is absolutely nothing in the remand statute,

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[13] *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642, 646-47 & n8 (5th Cir 1978). Although that Court went on to deny the writ because of an ambiguity in the order, the *Merrimack* Court did explicitly recognize, by footnote, that permitting joinder of a nonindispensable, nondiverse defendant clearly was outside of a District Court's discretion, and that such an exercise of discretion was one outside of the exclusive grounds of 28 USC §1447(c) and hence a remand predicated thereon was reviewable by mandamus. *Id.* at 647 & n8.

In fact, the Fifth Circuit has recently restated the importance of the question," [w]e reserve for decision when the issue is squarely presented whether a district court may allow joinder of a nondiverse party who is not indispensable even though such joinder may result in remand." *IMFC Prof.* v *Latin Am. Home Health*, 676 F2d 152, 159 n14 (5th Cir 1982). Additionally, the Tenth and the Seventh Circuit have held that remands based upon discretionary grounds not found in 28 USC §1447(c) are subject to review by the Court of Appeals by mandamus and must be vacated. *Sheet Metal Workers Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000, 1002, 1005 & n7 (10th Cir 1982); *Ryan* v *State Bd. of Elections of State of Ill.*, 661 F2d 1130, 1133 (7th Cir 1981).

28 USC §1447(c), that even remotely resembles as grounds for remand the addition of parties whose nonindispensable presence destroys otherwise proper jurisdiction because "strong equities" compel that presence "so that in one lawsuit a proper fact finder can in due course make a determination with everyone in front of it." Appendix, p. 30a. The Tenth Circuit recently vacated, by mandamus, a remand based on the ground that the state court was "the most equitable forum," in view of a restriction of federal remedies. *Sheet Metal Workers' Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000, 1002 & n2 (10th Cir 1982). The Court of Appeals reasoned that this was not a ground authorized by §1447(c) and then analogized the nonstatutory ground asserted to those utilized in *Thermtron*. In both instances, the District Judges had erroneously ordered remand because the 'plaintiff's rights of redress was being severely impaired.' *Id.* at 1005, *citing Thermtron* v *Hermansdorfer*, 423 US at 340-41. In the instant matter, the Respondent also improperly ordered remand because he felt Plaintiffs' right of redress was impaired in federal court. For that reason Respondent's Order of Remand should be similarly vacated.

There are also facts or events peculiar to this case which not only evidence a remand affirmatively predicated upon non statutory grounds, but which also warrant this court exercising its supervisory power over Respondent. First, the Order of Remand that Respondent entered *sua sponte* on September 27, 1982 bore absolutely no resemblance to the ruling upon which he actually based the remand. Petitioner submits (as discussed in detail elsewhere in this Petition and extensively in the court below Appendix, p. 4a), that the Order was a "sham."

Second, unlike any remotely analogous situation in any reported decision, the parties here *were actually still diverse* at the time the Court entered the Order of Remand. No written Order had been entered at that time (or at anytime) permitting the Amended Complaint. Dow Chemical Company, the alleged nondiverse Defendant, *was not before the District Court* even as a named, but unserved Defendant. Therefore, even the untenable ground for the remand — that "equity" required the

nondiverse' nondispensable Dow Chemical's presence in the suit — did not in fact exist when the Remand Order was entered!

Third, the unstated but possibly controlling motive for the *sua sponte* September 27, 1982 Remand Order was to clear the matter from his overcrowded docket by the end of the month. This concern over an overcrowded docket was precisely the disapproved rationale utilized by Judge Hermansdorfer in *Thermtron*.

Your Petitioner is not unaware that the most recent decision of this Court addressing the reviewability of remand orders by mandamus, *Gravitt* v *Southwestern Bell Tel. Co.*, 430 US 723 (1977), involved an erroneous, and yet unreviewable understanding of the absence of diversity jurisdiction which precipitated remand. None-the-less, *Gravitt* is inapposite here for a variety of reasons. Foremost of these is that the Respondent Judge, in his discussion allowing the amendment in view of "strong equities," which he noted would 'destroy diversity automatically,' acknowledged that federal jurisdiction was entirely proper and present! Cf. *Ryan* v *State Bd. of Elections*, 661 F2d 1130, 1333 & n3 (7th Cir 1981). The Court of Appeals completely ignored this fact when it ruled that *once* the nondiverse party *was added*, remand was proper.

Moreover, it should also be noted that subsequent to what has been characterized as the terse *Gravitt* per curiam,[14] the Courts of Appeals have been faced with ambiguity and an absence of clarity relative to the avenue of reviewability opened by *Thermtron*. Most of them have taken *Gravitt* as a signal from this Court that unless "the order does not clearly rely on reasons other than those permitted under the statute," i.e., 28 USC §1447(c), "the remand order cannot be reviewed."[15] Only

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[14] *See* Note, *Remand Order Review After Thermtron Products*, 1977 Ill. L. Forum 1086, 1103.

[15] *In re Chevron Chemical*, Slip Op. at 2 (6th Cir. No. 82-8063, December 10, 1982); *Chesapeake & Ohio Rwy Co.* v *U.S. District Court*, Slip Op. at 2 (6th Cir. No. 82-1155, May 21, 1982); *State Farm Mut. Aut Ins.* v *Baasch*, 644 F2d 94, 96 (2nd Cir. 1981); *In re Weaver*, 610 F2d 335, 337 (5th Cir 1980);

in the rarified and exceptional case where the District Judge does not mention the statute or the standards of remand of §1447(c), *and* thereafter affirmatively states grounds for reversal not contained therein, do the Circuits obviously believe that they may review an order of remand by mandamus.

Some of the Courts have stated it somewhat differently focusing in on restrictive language appearing in *Thermtron* and, at least to their understanding, adhered to and reiterated in *Gravitt*: "if a trial judge *purports* to remand a case on the ground that it was remanded 'improvidently and without jurisdiction,' his order is not subject to challenge in the Court of Appeals . . . ."[16] Despite such restrictions, however, the Courts of Appeals subsequent to *Gravitt*, have, with a concomitant frequency, issued writs in the nature of mandamus compelling District Judges to vacate orders of remand.[17]

Given the convolutions of the state of the law in this area, it is difficult for litigants and the Courts of Appeals to determine when review by mandamus is authorized and appropriate and when it is not. One Circuit has attempted a workable and simplified definition relative to the limits of its authority:

> It thus appears that where we are specifically forbidden to review action by a district judge when the judge

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In re Greyhound Lines Inc., 598 F2d 883, 884-85 (5th Cir 1979); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642, 647 (5th Cir 1978). *See also Levy* v *Weissman*, 671 F2d 766, 769 & n9 (3rd Cir 1982). *See also* Note, *Remand Order Review After Thermtron*, 1977 Ill L. Forum 1086, 1103-04.

[16] *Royal* v *State Farm & Cas Co.*, 685 F2d 124, 126 (5th Cir 1982), *citing, Thermtron Products Inc.* v *Hermansdorfer*, 423 US at 343 (emphasis in *Royal*).

[17] *See, e.g. Sheet Metal Worker's Ass'n AFL-CIO* v *Seay*, 693 F2d 1000 (10th Cir 1982); *Levy* v *Weissman*, 671 F2d 766 (3rd Cir 1982); *In re Shell Oil Co.*, 631 F2d 1156 (5th Cir 1980); *In re Carter*, 618 F2d 1093 (5th Cir 1980), *cert denied*, 450 US 949 (1981); *In re Greyhound Lines, Inc.*, 598 F2d 883 (5th Cir 1979). *See also, Ryan* v *State Bd. of Elections*, 661 F2d 1130 (7th Cir 1981); *Merrill, Lynch et al* v *Gayden*, 637 F2d 391, 396 n9 (5th Cir 1981); *Three J. Farms, Inc.* v *Alton Box Bod Co.*, 609 F2d 112 (4th Cir 1979) (mandamus appropriate to vacate vacation of remand); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642 (5th Cir 1978) (although writ would not lie in case regarding ambiguous order, clearly improper ground of remand after allowing amendment of nondiverse, nonindispensable party would warrant issuing the writ).

> is authorized to act, *it may, nevertheless be our duty to decide whether or not the action was, indeed, authorized.* Erroneous action taken within authority may not be corrected; *unauthorized acts may be curbed.*

Meadows v *United States*, 665 F2d 1009, 1012 (11th Cir 1982) (emphasis supplied).

It is apparent, however, that even under this simplified articulation, the joinder of a nondiverse, nonindispensable party and basing remand thereon, necessarily mandates inquiry into the merits of remand; an inquiry not even attempted in this instance by the Sixth Circuit Court of Appeals.[18] *See also Thermtron Products, Inc.* v *Hermansdorfer*, 423 U'S at 356 (Rehnquist, J, dissenting). Moreover, whether or not these same limitations apply to review *in this* Court was not addressed in *Thermtron* or *Gravitt*. In view of this confusion and lack of clarity, this Court should grant a writ of *certiorari* to clarify and harmonize *Thermtron* and *Gravitt* and delineate when review by mandamus is appropriate in the Court of Appeals and/or in this Court.

III.

The Entry of a "Sham Order" of Remand Calls for this Court to Exercise Its Power of Supervision Over Respondent and Over the Court of Appeals for Sanctioning His Conduct. Moreover, This Court Has Never Addressed Whether It Can and/or Should Exercise That Power

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[18] "Of more importance is the elimination of dissatisfaction by the general public with our system of jurisprudence, a goal which can best be accomplished by reducing the possibility for error and increasing the likelihood of uniformity of decisions. Congress should seriously consider repeal or amendment of the removal statutes to allow appellate review of remand orders. *In the interim the judiciary should, at a minimum, reduce the complexity of this issue by inquiring through mandamus into the grounds underlying those remands which do nothing more than recite the "improvidently removed" and "without jurisdiction" language.* Such a policy may result in the ultimate reduction of delay in the federal courts and even the elimination of unnecessary litigation. It will certainly have the salutary consequences of abrogating the abuses which permeate this area of the law and ultimately advancing the interests of justice."
Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?* 48 Miss. L.J. 741, 754 (1977) (emphasis added).

Regarding Such a "Sham Order," Notwithstanding 28 USC §1447(d). Additionally, The Question Has Been Explicitly Cited by Members of This Court as a Ground for Granting *Certiorari* and Presents the Court with an Opportunity to Harmonize Earlier Opinions.

Petitioner further contends that the Respondent's entry of the September 27, 1982 Remand Order which was thoroughly dissimilar to the content, substance or tenor of his ruling of September 23, 1982, constitutes a severable and separate abuse of discretion reviewable by mandamus. It is respectfully submitted, that the September 27, 1982 Order is a sham, or at best an order entered with gross disregard for either the statutes or due process. By way of background, it is important to note that there was a breakdown of the adversary processes in relation to the remand so as to deprive Petitioner of the most rudimentary aspects of due process of law. Respondent, *one day after transfer* of the case to his docket and one day after the filing of the Motions to Amend and for Remand, orally ordered counsel to appear at a Remand Hearing *the following day*. At that hearing, the Respondent refused to address the correctness of the original removal as well as Petitioner's request to present papers in opposition and then and there ordered remand because, he felt, the equities justified it. By thus acting impetuously and arbitrarily, the Respondent precluded Petitioner from presenting a legion of arguments as to why remand was not permitted and further illustrated his intention to remove the matter from his docket, without regard to the law.

If this were not enough to establish the non-adversarial and unconstitutional characteristics of Respondent's conduct, it is important to also note what happened subsequent to the remand hearing. Petitioner adamantly intended on pursuing presentment of order proceedings but, again, the adversarial process was aborted by Respondent's *sua sponte* entry of the Remand Order before the end of September. Had counsel been permitted to participate as to the Order's form, they would have been able to demonstrate that the record bore

absolutely no resemblance to the language of the Order and also that no order granting the amendment had ever been entered.

There was absolutely nothing in the Court's September 23, 1982 ruling, counsels' argument or the moving papers of the Plaintiffs that intimated improvident removal. Similarly, the 'standard form' language ("it appearing that there is no federal jurisdiction in the above-entitled matter" with the words "lacking total diversity" typed in thereafter), does not comport in the slightest with the then present posture of the case, the Court's rulings or Plaintiffs' moving papers.

Lest Respondent's mere recitation of the words, "there is no federal jurisdiction," lead to the misunderstanding that this was an erroneous, but nevertheless unreviewable finding, *it is essential to again note that Respondent acknowledged the presence of diversity jurisdiction prior to considering the motion to remand because he admitted such was capable of being "destroyed" if he granted the amendment.*

Simply put, the form language of the Remand Order does not, in the slightest, reflect the content of the Respondent's ruling nor does it contain anything reflecting the real basis for the remand, i.e., the totally arbitrary finding that "equity" required the amendment. Moreover, the Order claims the case "lacks diversity" when *in fact* no Order of Amendment was *ever* entered. By entering the Remand Order the Respondent did not merely compound his error, he implemented one unauthorized act by committing another.

Ironically, the very grounds the Petitioner asserts constitutes a separate ground warranting the use of mandamus, i.e. the entry of an Order that does not in the least comport with Respondent's ruling, might sadly be said to be an item which might altogether preclude review. One Court of Appeals, in dicta and in acknowledging its understanding of what *Gravitt* compels, has stated that a mere recitation of §1447(c), or of the grounds therein, automatically insulates a remand order from review, irrespective of the grounds upon which the Judge has

based his ruling.[19] Various scholars have also so read *Gravitt* but not without first severely criticizing such a result.[20] Petitioner recites this state of affairs and understanding of the law if only to demonstrate the absurdity of the position. Courts and scholars find it unpalatable that the utterance of a talisman by a trial judge makes his actions totally immune from review of either the circumstances of the case or the extent of his arbitrariness. Yet, such will continue to be the legacy of *Gravitt* unless the Court grants *certiorari* and thereafter corrects such abuse by issuing its writ of mandamus.

Although the "magic word" understanding of unreviewability might arguably be an educated, but exaggerated extrapolation of this Court's precedents, and although it appears to mandate repudiation, the question has never been faced full front by this Court. Justice Rehnquist prophetically recited the issue, and the fact that it would have to be addressed, in his dissent in *Thermtron:*

> (W)hat if the district court does state that it finds no jurisdiction, using the rubric of §1447(c), but the papers

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[19] *See Royal* v *State Farm Fire & Cas. Co.*, 685 F2d 124, 126-27 (5th Cir 1982); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d at 648 ("District Court invocation of §1447(c) will preclude review of a remand order no matter how clearly erroneous the order appears on its face"); *Robertson* v *Ball*, 534 F2d 63, 65(5th Cir 1975).

[20] "[A] district court apparently can insulate its remand order from any review under *Thermtron* by mechanically invoking the §1447(c) grounds for remand."
Note, *Remand Order Review After Thermtron Products*, 1977 Ill. L. Forum 1086, 1106.

"*Southwestern Bell* is particularly disappointing in that the Supreme Court placed emphasis exclusively on rote recitation of language and gave no consideration to the erroneous decision-making process underlying the remand order."
Meyers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?* 48 Miss. L. J. 741, 754 (1977).

"Apparently, a remand order which so much as mentions "improper removal" will be precluded from review. Even mandamus will not lie to prevent a judge from remanding for reasons completely irrelevant to 1447(c) grounds, as long as his order recites "improper removal.""
Rible, *Federal Courts: Review of the Remand Order*, 9 St. Mary's L. J. 274, 285-86 (1977).

> plainly demonstrate such a conclusion to be absurd? Are potential challengers to such an order entitled to seek the aid of the court of appeals, first to demonstrate that the order entered by the lower court was a sham and second to block that order pursuant to today's decision. If the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open to potential opponents of orders of remand.

Thermtron Products Inc. v *Hermansdorfer,* 423 US at 357 (Rehnquist, J., dissenting). Several scholars agree that such a sham order must be reviewable.[21]

Despite this and the fact that the integrity of the entire judicial system is undermined when Judges enter "sham" orders, the Sixth Circuit Court of Appeals failed to even discuss the matter. To foreclose review by mandamus, under such circumstances, would not only serve to emasculate *Thermtron* and the effectiveness of the great prerogative writ to correct injustice, but reward abuse if "validated" by hollow recitations. Moreover, in view of the Respondent's attempt to avoid review of his unconstitutional conduct by entering an "insulated order," it is even more compelling that the caviler and precipitous treatment afforded Petitioner be subject to review.

For these reasons, it is respectfully urged that this Court should issue its writ of *certiorari* and, after a full consideration upon the merits, thereafter either a) issue a writ of mandamus directly to the Respondent compelling him to vacate the remand order, or b) direct the Court of Appeals for

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[21] *"The ineffectiveness of precluding review by evaluating only the face of a remand order seems clear.* If the district judge in *Thermtron*, who remanded because of a crowded docket, had simply stated in the order that the case had been "improperly removed," his action would have been nonreviewable under the apparent logic of the per curiam decision in *Southwestern Bell.* The purpose of mandamus is to correct discretionary abuse. If such abuse may be precluded from review simply by masking the remand order as being pursuant to "improper removal," the avenue of appeal opened in *Thermtron* becomes virtually nonexistent."
Rible, *Federal Courts: Review Of The Remand Order,* 9 St. Mary's L. J. at 286.

the Sixth Circuit to issue a writ of mandamus to the Respondent compelling him to vacate said order.

IV.

The Case at Bar Presents the Court with a Unique Opportunity to: 1) Establish that the 1948 Judicial Code Did Not Eliminate this Court's Statutory Supervisory Power Over the Lower Federal Judiciary Derived from §§13-14 of the Judiciary Act of 1789; 2) Establish that this Court Has Inherent Supervisory Power Over the Lower Federal Judiciary; and, 3) Demonstrate that, Under Certain Circumstances, Congress Cannot Interfere with Such Powers of this Court, Although It Can Limit Analogous Powers of the Court of Appeals. Moreover, These Questions Have Never Been Definitely Addressed by this Court and Should Be Considered In View of the Far Reaching Impact They Could Have Upon Clarifying the Operative Powers, and Limitations Thereon, of the Judiciary and the Congress Under Article III.

Dissenting in *Thermtron*, Justice Rehnquist suggested that in view of the fact that Congress, under Art III, §1, had the sole constitutional prerogative to create the Courts of Appeals and their jurisdiction, it could, in any fashion, correspondingly limit that jurisdiction. *Thermtron Products Inc.* v *Hermansdorfer*, 423 US at 354, *citing, Sheldon* v *Sill*, 51 US (8 How) 441 (1850). Petitioner suggested in the Court below that even if this proposition were not debatable, (*but see* Sager, *The Supreme Court Term-1980 Forward: Constitutional Limitations on Congress' Authority To Regulate The Jurisdiction Of The Federal Courts*, 95 Harv. L. Rev. 17, 25-29 (1981)), such rationale could not dispossess *this* Court of jurisdiction to correct the otherwise arbitrary and capricious conduct of Respondent, it being a constitutional Court *not* created by Congress. Nevertheless, it would appear to be the view of at least one (or more) of the members of this Court that §1447(d) catagorically precludes review in *both* the Court of Appeals *and* this Court, *Thermtron Products Inc.* v *Hermansdorfer*, 423 US at 361 (Rehnquist, J., dissenting). However, the *Thermtron* majority suggested otherwise. Thus, by granting the writ of *certiorari* herein prayed

for, this Court not only has the unique opportunity to resolve this ambiguity but also has the opportunity to establish various far reaching principles relative to the extent of, and limitations upon the respective powers the Court and the Congress retain relative to the "judicial power" of the United States.

The reading of §1447(d) by the Sixth Circuit Court of Appeals, in the instant matter, squarely puts such issues before this Court; that review was precluded once the nondiverse party was added, and that presentation of grounds independent of the remand existed to issue a writ of mandamus would not be permitted. As a result, the question of whether or not the same bar does or *can* apply to the jurisdiction of this Court is clearly presented.

Simply put, did Congress intend to, or *may* it constitutionally impair the supervisory powers of *this* Court over the conduct of the inferior federal judiciary merely because that conduct occurred in the remand context? These questions have never been addressed, and, due to the fact that they go to the heart of the operation of the federal judiciary and, correlatively, to aspects of the inter-relationship that exists between Congress and the Federal Courts under Article III, they require resolution.

First, it is important to recognize that such an impairment of this Court's power to review and supervise the conduct of the inferior federal judiciary by mandamus would be to dismantle one of the greatest (and oldest) engines of justice ever devised. The great prerogative writ of mandamus is said to have its origins in that clause of the Magna Charta that declares "nulli vendemus, nulli negabimus, aut differemus rectum vel justitian" — to none will we sell, to none will we deny, or delay equity or justice. Magna Charta, Cl. 40. *See* T. Tapping, *The Law & Practice of the High Prerogative Writ of Mandamus* 56 (1853). Our common law heritage of the writ being that last resort to remedying judicial or quasi-judicial abusive conduct was put most aptly by Lords Mansfield and Wilmot when they said,

> [The Petitioner] has a right to come here for this writ, this great prerogative writ of mandamus, (a remedy which turns more, in my opinion, upon principle than upon precedent;) and we ought to grant it, because there is no other remedy.
>
> . . .
>
> If there is a clear right in [Petitioner], the Court ought . . . to find out a suitable and adequate remedy; and . . . even to have made a precedent, if they could not have found one: for where there is a right, law and justice require that there should be some remedy or other. . . ."

Rex v *Vice-Chancellor of Cambridge University (Earl of Hardwicke's Case)*, 3 Burr 1648, 1660; 97 E.R. 1027, 1033 (1765) (Mansfield & Wilmot, LJJ.). Moreover, there is no doubt that this noble history was incorporated into our constitutional framework so as to permit this Court to supervise the inferior federal courts. *See Ex Parte Crane*, 30 US (5 Pet) 190, 191-93 (1831) (Marshall, CJ). Indeed, the first judiciary act specifically authorized it. Judiciary Act of 1789, §13.

Petitioner primarily submits that Congress in enacting 28 USC §1447(d) could not have intended the abrogation of this Court's supervisory powers, to be exercised via mandamus in aid of its appellate jurisdiction and derived from §13 of the Judiciary Act of 1789, in correction and supervision of the conduct of the inferior federal judiciary. Particularly must this be true in those circumstances where grounds independent of remand exist for issuance of the writ, for such would clearly undermine both an independent judiciary and tarnish the authority of this Court as "Supreme." And this proposition is posited, notwithstanding dicta to the contrary, in *Ex Parte Pennsylvania Co.*, 137 US 451 (1890), which, parenthetically, appears to have been repudiated in *Thermtron Products, Inc.* v *Hermansdorfer*, 423 US at 343 (review precluded "*in the court of appeals* by appeal, by mandamus, or otherwise").

Second, and ancillary to this contention, this Court has the rare opportunity to definitely establish that §13 and §14 of the Judiciary Act of 1789, as they conferred supervisory powers

over the inferior judiciary upon this Court did in fact survive incorporation into §§234 & 262 of the Judicial Code of 1911 and further consolidation into the 1948 revision of the Code in the All Writs Act, 28 USC §1651(a). *See Chandler* v *Judicial Council*, 398 US 74, 127-28 n.15 (1970) (Harlan, J., concurring).

Third, although this Court's mandamus jurisdiction has long been determined to exist only in aid of its appellate jurisdiction and does not arise originally, *Marbury* v *Madison*, 5 US (1 Cranch) 137, 175 (1803), it is "[b]eyond" cavil, the issuance of a writ of mandamus to an *inferior court* is an exercise of appellate jurisdiction." *Chandler* v *Judicial Council*, 398 US at 96 (Harlan J., concurring), *citing, In re Winn*, 213 US 458, 465-66 (1909). Additionally, although it is generally agreed that while Congress may make exceptions to and regulations concerning the appellate jurisdiction of this Court by virtue of Art. III, §2, Petitioner would submit that there *must* exist some restrictions upon that power. *See* Sager, *The Supreme Court—1980 Term: Foreward*, 95 Harv. L. Rev. at 33 & n42. Even assuming *arguendo* that such was contemplated by 1447(d), this submission is particularly compelling when Congress, as here attempts to restrict a function fundamentally necessary to the operation of the federal judiciary — supervision of that judiciary by this Court. Petitioner would also suggest that perhaps the tension existing between the majority and the dissenters in *Thermtron* was an unarticulated disagreement over whether any such restrictions do or can exist upon this Congressional prerogative.

Finally, Petitioner further submits that having bestowed broad powers of supervision upon this Court by virtue of 28 USC §1651(a) or otherwise, Congress cannot constitutionally abrogate those powers relative to the correction of a Judge's abusive conduct even if such conduct occurs in a remand proceeding. *Cf. Thermtron Products Inc.* v *Hermansdorfer*, 423 US 336. Moreover, even if such power of supervision were not conferred by statute, it is submitted that it does exist for it is inherently necessary to the operation of this Court as "Supreme." Indeed, Art. III, §1 specifically categorizes this Court as "Supreme" in relation to "inferior courts" and that charac-

terization must, necessarily, carry with it the supervisory ability to act 'the part.' Such jurisdiction is, or would have to be self-effectuating although it is entirely appellate in nature. Therefore, Congressional attempts (e.g. §1447(d) as read by the Court of Appeals) to restrict the supervisory authority of this Court over Respondent in view of conduct independent of the remand would patently violate the doctrine of separation of powers for what lies at the core of Article III — the ultimate authority of this Court to review the acts of the federal judiciary — would be negated.

In view of the uniqueness of the questions discussed, this Court is respectively urged to grant its writ of *certiorari* and review this matter of its merits in order that the respective roles and limitations the Constitution delegates between this Court and the Congress under Article III may be defined. Thereafter, it is equally urged, that a writ of mandamus issue vacating the Remand Order entered by the Respondent.

CONCLUSION

For all of the aforementioned reasons, a writ of *certiorari* should issue to review the Order of the United States Court of Appeals for the Sixth Circuit. Alternatively, a writ of mandamus should issue to the Sixth Circuit compelling it to direct the Respondent to vacate the Order of Remand, or in the further alternative, this Court should issue a writ of mandamus directly to Respondent compelling him to do the same.

Respectfully submitted,

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DATED: February 21, 1983

*Admitted to practice before the Bar of this Court on February 22, 1971.

82-1486

Office-Supreme Court, U.S.
FILED
MAR 7 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

CHEVRON CHEMICAL COMPANY, A Delaware Corporation,
Petitioner,

vs.

HON. HORACE W. GILMORE, United States District Court Judge for the Eastern District of Michigan,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

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I

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

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No. 82-8063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ORDER

(Filed Dec. 10, 1982. John P. Hehman, Clerk)

IN RE: CHEVRON CHEMICAL COMPANY,
Petitioner

BEFORE: MARTIN and KRUPANSKY, Circuit Judges; and BROWN, Senior Circuit Judge.

The petitioner, a defendant in the removed diversity action below, seeks a writ of mandamus directing the district court to vacate its order remanding that action to the state court.

The plaintiffs originally filed this tort action in the Wayne County (Michigan) Circuit Court naming the petitioner as the sole defendant. The petitioner (a Delaware corporation) removed the action to the district court on grounds of diversity of citizenship. After extensive discovery, the plaintiffs moved to amend their complaint so as to add an additional party defendant. Because that party was a Michigan corporation, they also moved for a remand to state court on grounds the diversity jurisdiction of the district court would be divested. The district court held a hearing in the matter and granted both motions. This petition followed.

In *Thermtron Products, Inc.* v *Hermansdorfer,* 423 U.S. 336 (1976), the supreme Court held that remand orders based upon the grounds found in 28 U.S.C. §1447(c), *i.e.,* that the case was removed "improvidently and without jurisdiction," are "not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Id.* at 343. Review via mandamus is permissible however, if the remand is based on grounds other than those found in §1447(c).

In this case, the order of remand specifically relied upon the grounds that the removal had been improvident and that the

district court no longer had jurisdiction in the matter because total diversity of citizenship was lacking. The petitioner seeks to avoid the obvious impact of that language by arguing variously that (1) the remand order was a "sham" that should be ignored, (2) the grounds really relied upon the district court did not fall within the purview of §1447(c), and (3) there are bases for mandamus review in this action, *e.g.*, denial of due process, wholly independent of the remand order and which are not barred by *Thermton Products* and its progeny.

This Court has carefully examined the petitioner's extensive memorandum in this matter, the cases cited therein, and the record of the proceedings below. Upon consideration thereof, we find that once the non-diverse party was added, remand to the state courts was properly found upon §1447(c). Mandamus review is thus precluded. That is true even if this Court could conclude, as the petitioner argues, that the non-diverse party was erroneously joined in this action. *See In Re Merrimack Mutual Fire Insurance Co.*, 587 F.2d 642 (5th Cir. 1978). *Cf. Royal* v *State Farm Fire and Casualty Co.*, 685 F.2d 124 (5th Cir. 1982). Therefore,

It is ORDERED that the petition for a writ of mandamus be and it hereby is denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

(Title of Court and cause)

(Received December 13, 1982)
December 10, 1982

Mr. John K. Parker
Bushnell, Gage, Doctoroff, Reizen
3000 Town Center, 15th Floor
Southfield, MI 48075

Re: Case No. 82-8063 In Re: Chevron Chemical Co. District Court No. 81-70555

Dear Mr. Parker:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
John P. Hehman, Clerk
By: /s/ Linda L. Brinson
Deputy Clerk

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Marie E. Munn, et al
Plaintiff(s)

CIVIL ACTION
NO. 81-70555

vs.

Chevron Chemical Co, et al
Defendant(s)

ORDER OF REMAND

It appearing that the within case was improvidently moved to the United States District Court for the Eastern District Michigan, and

It further appearing that there is no Federal jurisdiction the above-entitled matter, lacking total diversity

IT IS HEREBY ORDERED that this case be remanded to the Circuit Court for the County of Wayne, Michigan.

/s/ _____
HORACE W. GILMORE
UNITED STATES DISTRICT JUDGE

Dated: September 27, 1982

(Title of Court and Cause)

Clerk,
Wayne County Circuit Court
81-70555
RE: Munn v. Chevron

Dear Sir:

Pursuant to an order of this Court dated 9/27/82, signed by the Honorable Horace Gilmore, United States District Judge, the above entitled action is transferred to your district.

The papers enclosed herewith constitute the entire file in this case. A certified copy of the Order of Transfer is included in lieu of the original which is retained for our files. A certified copy of the docket entries is also enclosed.

Kindly acknowledge receipt on the enclosed copy of this letter.

Yours truly,
Robert A. Mossing, CLERK
BY: Sandra Ewing-Mendoza
Deputy Clerk

(Title of Court and Cause)

Proceedings had before the Honorable Horace W. Gilmore, United State District Judge, at Detroit, Michigan, on Thursday, September 23, 1982.

APPEARANCES:
Mr. Robert A. Tyler
Appearing on behalf of Plaintiffs
Mr. Carl J. Marlinga
Appearing on behalf of the Defendant
REPORTED BY:
Elizabeth A. Higdon
Official Court Reporter
(Tr-2)

Detroit, Michigan
Thursday, September 23, 1982

* * * * *

THE COURT: All right, gentlemen, thank you.

The issue is whether I should allow an amendment of the Complaint to allow the Plaintiff to join Dow Chemical. If I grant the Amended Complaint, it destroys diversity and the

case will automatically be remanded to the Wayne County Circuit Court.

The Defendant strongly objects to allowing the amendment, claiming the case is worked up, that it is about to go to trial, that this is a maneuver by the Defendant to get more time for discovery, to name an expert, that the whole claim against Dow will be on a hearsay basis, and so forth. He cites as basic authority Moore on Federal Procedure, Volume 1A, Section 0.161(1) at page 208, where Moore says, in effect, that Courts should not allow Complaints to be amended by adding an additional Defendant to destroy diversity unless there are strong equities in favor of the amendment or unless the party is an indispensable party. That unless one of those two things is present, Moore says that Courts should normally deny leave to (Tr-3)
amend, since on the whole Rule 21, in dropping and adding parties, looks to the preservation rather than the destruction of jurisdiction.

Well, I don't have a great deal of argument with Moore on this one, but I don't see how I can say here, however, that the equities — that there are not strong equities in favor of the amendment. I don't know whether Dow Chemical is at all responsible for this, but certainly, although they may not be an indispensable party, in using that as a term of art, certainly I would think they are an indispensable party if there is a claim that they are responsible for this, a legitimate claim. I certainly also think that the equities favor allowing such an amendment so that in one lawsuit a proper factfinder can in due course make a determination with everyone in front of it. I therefore will grant the amendment and I will remand the case to the Wayne County Circuit Court.

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CERTIFICATE

I, Elizabeth A. Higdon, do hereby certify that I reported

stenographically the proceedings had in the above-entitled cause before the Honorable Horace W. Gimore, United States District Judge, at the time and place hereinbefore set forth; that the same was thereafter reduced to typewritten form under my supervision; and I do further certify that the foregoing transcript is a full, true and correct transcript of my stenographic notes.

ELIZABETH A. HIGDON
Official Court Reporter

Dated: Detroit, Michigan
September , 1982

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U.S. CONSTITUTION

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT V

No person shall bee . . . deprived of life, liberty, or property, without due process of law:

STATUTES

28 §1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate an independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

28 §1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon his or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district

court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall

give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed not further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

28 §1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary to appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Judicial Code of 1911 §§234, 262

SEC. 234. The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction: and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

SEC. 262. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Judiciary Act of 1789 §§13, 14

SEC. 13. *And be it further amended,* That the State Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specifically provided for; and shall have power to

issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

SEC. 14. *And be it further enacted,* That all the beforementioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. — *Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

RULES

28 USC Rule 19. Joinder of Persons Needed for Just Adjudication.

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a

plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

28 USC Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction,

occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of plaintiffs according to their respective rights to relief, and against one or more defendant according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

28 USC Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.

IN RE: CHEVRON CHEMICAL COMPANY,
PETITIONER

CHEVRON CHEMICAL COMPANY'S
PETITION FOR WRIT OF MANDAMUS

On Petition for Writ of Mandamus From
the United States District Court for the
Eastern District of Michigan

in the case of
Marie E. Munn and George E. Munn
v.
Chevron Chemical Company
Civil Action No. 81-70555

BUSHNELL, GAGE, DOCTOROFF & REIZEN
3000 Town Center, Suite 1500
Southfield, Michigan 48075
(313) 444-4848

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: CHEVRON CHEMICAL COMPANY,
Petitioner

CASE NO.

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STATEMENT OF ISSUES

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THE DISTRICT COURT'S RULING WHICH DOES NOT PURPORT TO BE PREDICATED UPON THE GROUNDS FOR REMAND PERMITTED BY 28 USC §1447(c) AND WHICH MOREOVER IS AFFIRMATIVELY PREDICATED ON GROUNDS WHOLLY DIFFERENT FROM THOSE DESCRIBED THEREIN IS SUBJECT TO REVIEW BY THIS COURT BY MANDAMUS AND MUST BE VACATED

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: CHEVRON CHEMICAL COMPANY,
Petitioner.

CASE NO.

PETITION FOR WRIT OF MANDAMUS
WITH STATEMENT OF RELIEF REQUESTED

NOW COMES Petitioner, CHEVRON CHEMICAL COMPANY, by and through its attorneys, BUSHNELL, GAGE, DOCTOROFF & REIZEN, and Petitions this Court for a Writ of Mandamus directed to the Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, pursuant to the All Writs Act, presently codified in 28 U.S.C. §1651, the Federal Rules of Appellate Procedure 21(a) and Rule 23 of this Court, Compelling him 1) to vacate his Order of September 27, 1982, remanding the case of *Marie E. Munn and George A. Munn* v *Chevron Chemical Company,* Civil Action No. 81-70555, to the Wayne County Circuit Court and 2) to either restore said action to the docket of the United States District Court for the Eastern District of Michigan or to dismiss it altogether.

STATEMENT OF FACTS

The facts pertinent to this Petition are painfully simple. Plaintiffs, citizens of Michigan, commenced a products liability action against Defendant CHEVRON CHEMICAL COMPANY in Michigan's Wayne County Circuit on February 13, 1981. The Complaint alleges that a product of Defendant's known as "Weed Be Gone" was defectively manufactured and caused Plaintiff GEORGE A. MUNN to contract a terminal carcinoma, caused Plaintiff MARIE E. MUNN to lose the consortium of her husband, and further alleged that damages exceeded Ten Thousand ($10,000.00) Dollars. (A-8 to A-10).

On February 20, 1981, Defendant CHEVRON filed a Petition for Removal alleging, *inter alia,* that CHEVRON was a

Delaware Corporation with its principal place of business in California. Consequently, because the citizenships of the parties was diverse and the amount in controversy exceeded the jurisdictional limit of Ten Thousand ($10,000.00) Dollars, the Removal Petition averred that the action was one that could have originally been commenced in the United States District Court, under 28 U.S.C. §1332, and therefore, pursuant to 28 U.S.C. §1441, the action was removable to that Court. (A-15 to A-17). A bond was posted as required by 28 U.S.C. §1446 (A-15 to A-20) and CHEVRON took all other steps necessary to insure proper removal in a timely fashion. (A-11 to A-40). Neither the Plaintiffs nor the District Court have ever questioned or challenged removal as being anything but wholly proper.

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Having filed its Answer (A-33 to A-38) simultaneous to the Petition for Removal, the case thereafter proceeded into the discovery stage. Without burdening this Petition or the Appendix with details, it is adequate to simply state that both parties engaged in extensive discovery. *See* Docket Sheet (A-1 to A-6). Some nine months after the case was removed, District Judge Charles Joiner — the District Judge inititially assigned the case — ordered a Status Report Conference for the purpose of ascertaining the nature of the case, the work already accomplished by counsel and, most importantly, the future deadlines and working dates to be set. (A-41). At that Conference held on November 4, 1981 (A-2 Docket Entry of November 4, 1981), he entered an Order establishing the following calendars for the case: "Discovery cut-off was established for November 1, 1982; a Final Pre-Trial Order in compliance with a preordained form was to be submitted by November 10 1982; and a Final Pre-Trial Conference was set for November 15, 1982. Moreover, the Court set the matter down for trial on November 29, 1982 at 8:30 A.M. and required the disclosure of experts and the addition of parties to be accomplished by May 1, 1982. (A-42 to A-45).

Subsequent to that conference, on January 13, 1982, the case was reassigned to Judge Avern Cohn. (A-2 Docket Entry No. 26). No subsequent Order ever altered the dates established by Judge Joiner, save that Judge Cohn did permit an extension of time to the parties to "name their expert witnesses and add additional parties by September 1, 1982." (A-61 to A-62). That Order was entered at the request of Plaintiffs (and over

Defendant's objection (A-56 to A-60), by Motion, to Amend their Complaint (A-46 to A-55) to include a more detailed description of Mr. Munn's injuries and of Defendants product and for an Extension of Time to Bring in expert Witnesses and Add Parties.[1] In all other respects, Judge Joiner's Order and specified dates remained intact.

Sometime in mid August, 1982, counsel for the Defendant was approached by counsel for the Plaintiffs about extending the time to name expert witnesses. Counsel for the Defendant drafted a Stipulation, with proposed Order, to permit the parties to be able to disclose experts by October 1, 1982. He then sent those document drafts to counsel for the Plaintiffs but, apparently, counsel for the Plaintiffs elected not to present the Order to the Court until after the September 1, 1982 deadline had expired, as one was never entered until September 16, 1982.[2] (A-5 Docket Entry No. 56). In any event, the Stipulation in no way altered the September 1, 1982 deadline for naming additional parties. (A-5 Docket Entry No. 56).

Despite this, Plaintiffs filed a second Motion to Amend their Complaint with the Court on September 21, 1982 — twenty one (21) days after the cut-off date for adding parties. (A-5 Docket Entry No. 59; A-67 to A-69). Simultaneously, a symbotic Motion for remand was filed (A-5 Docket Entry No 60; A-70 to A-72). It, along with its one page Brief (A-71) asserted a domino theory in favor of remand. That is to say, Plaintiffs only contended that if the Motion to Amend was granted, there would no longer be complete diversity — the party to be

added, Dow Chemical, being a Michigan citizen — and the case, necessarily, would have to be remanded to State Court. These Motions, and the Briefs offered in Support thereof, should be carefully reviewed by this Court if only to demonstrate, by their insufficiency, that the subsequent actions of the District Judge's depriving the Defendant of adequate means and time to respond to them constituted a clear abuse of discretion.

The Motion to Amend simply asserts that at unspecified depositions, of unspecified persons (apparently Chevron employees), on unspecified dates "it was learned that Defendant's product was a compound of several substances, at least one of which is suspected of being carcinogenic" and "that said carcinogenic substance is manufactured by the Dow Chemical Company." Neither in the Motion to Amend nor the Brief offered in support is this mysterious substance identified, nor does either pleading attempt to establish that Dow provided Defendant CHEVRON with this substance in the manufacture of Chevron's products. Additionally, no reference is made to specific excerpt(s) from the transcription(s) of these unspecified deposition(s). The Motions and the record are thoroughly void as to how Dow Chemical is implicated in this lawsuit. At best, the Motion only establishes by mere assertion that "Dow Chemical Company *could* be involved in this litigation" (A-67), Dow's exact relationship to the case — like the "substance" — being a complete mystery. Indeed, the Motion contains no proposed Amended Complaint to establish on just what bases Dow was to be brought into litigation. Defendants therefore

were unable to ascertain if Dow was to be a potential cross-defendant, third party-defendant or simply a co-defendant.

Finally, the Brief in Support of the Motion provides perhaps the most revealing aspect of the entire matter (at least vis-a-vis the Plaintiffs) because there Plaintiff's unabashedly confess that the real purpose of their discovery efforts against Chevron was to "fish" out other potential Defendants!

Plaintiffs exercised discovery procedures for the purpose of determining what other Defendants should be involved in this litigation.

Brief In Support Of Plaintiffs Motion To Amend To Add Dow Chemical (A-68).

Plaintiffs then relied upon the purported talisman of *Forman* v *Davis,* 371 US 178 (1962) to justify granting the Motion to Amend because, apparently, "justice so requires" it.

The Plaintiffs effectuated service of these motions upon the Defendant by posting the Motions and Briefs on September 20, 1982. Proof of Service of Motions (A-74). In compliance with local rule normally providing at least ten (10) days for motion responses, E.D. Mich. Rule 17 (g), and at least an additional three or six days for mailing under Fed. R. Civ. P. 6(e), the Motion was set for hearing before Judge Cohn on October 17, 1982 (A-73) — almost one month after filing.

On September 21, 1982 counsel for Plaintiffs and counsel for Defendant received a conference call from Judge Cohn wherein he stated that he had received the Plaintiffs' Motions (filed that very day) and, given that he owned stock in Dow

Chemical Company, felt compelled to disqualify himself. He, therefore, entered an Order of Disqualification pursuant to 28 U.S.C. §455 on the same day and the clerk reassigned the case by blind draw to the Honorable Horace W. Gilmore (A-75). As of that date, September 21, 1982, counsel for the Defendant had yet to receive Plaintiffs' Motions to Amend Complaint and for Remand.

On the afternoon of the following day, September 22, 1982, counsel for the Defendant received a telephone call from Judge Gilmore's clerk directing him to appear the following day, September 23, 1982 at 2:00 P.M. for a hearing on the Motions. Although defense counsel was aware of the fact that Motions had been filed, he had yet to obtain those Motions at the time he received this phone call.[3]

Of course it goes without saying that defense counsel could

not adequately prepare for the hearing to be conducted less than twenty four hours from the time he was orally notified of the same — especially given that he did not have in his possession until later that afternoon the very Motion papers he was to oppose. Counsel therefore appeared at the hearing primarily to request that the Court permit him time to respond to the Motions in writing. The Court, however, was disinclined to pursue this course and inquired as to what arguments counsel could make in opposition to the Motions. In essence, counsel for Defendant focused upon a passage in Professor Moore's Treatise on Fedeal Practice and upon the upcoming trial date. The contention counsel hastily attempted to make via the Moore's citation was that the Rules of Procedure

governing joinder of parties were oriented toward the preservation of federal jurisdiction, *See, e.g.,* Fed. R. Civ. P. 19(a) (Sentence one, Clause 1) Fed. R. Civ. P. 21. This is particularly compelling when the party to be joined is not indispensable. Of course, the arguments related to the upcoming trial date are obvious — the Defendant contended Plaintiffs were attempting to obtain more discovery, postpone the trial and get more time to secure an expert for their questionable claim, simply by alleging, at the eleventh hour, that Dow Chemical could be liable for something.

More important than what was argued before, and rejected by Judge Gilmore however, is a purview of the arguments counsel could *not* make simply because of the truncated nature of the proceedings. Correlatively, these arguments — especially the ones touching upon the history of the case — demonstrate that there was no way Judge Gilmore could have possibly familiarized himself with the specifics of this case relevant to the motions in one day; particularly when he extracted himself from the protection that the adversarial process inherently provides every decisionmaker.

For example, Chevron, through its counsel, did not have an adequate opportunity to prepare or even file written memoranda in opposition. He did not have the opportunity to demonstrate to the Court that the very relief sought by Plaintiffs was precluded by Judge Cohn's Order of May 10, 1982 requiring the addition of parties by September 1, 1982. He was not able to establish, that there was substantial authority to the effect that a District Court has no discretion to

grant an amendment under such circumstances; or that the Defendant could well be left without any remedy to correct the District Court's abbreviated approach to the motions, given the general prohibition of review of remand orders found in 28 U.S.C. §1447(d); or that complex and difficult questions regarding the limited circumstances in which remand is appropriate under 28 U.S.C. §1447(c) are implicated by the case.

Neither did counsel have an opportunity to present arguments regarding the gross inadequacy of the motions to demonstrate particularly how Dow was implicated, or the nature or identity of the mysterious carcinogenic substance or its relationship to Chevron products, or the names, dates and specific testimony of the witnesses who allegedly triggered counsel's fancy to pursue Dow. Additionally, counsel did not have an opportunity to establish that, by admission in their own pleadings, *Plaintiffs' acknowledged a thoroughly wrongful purpose for their discovery efforts against Chevron — to seek out new Defendants and bravely go where the Rules do not permit litigants to travel!* Further, defense counsel was unable to establish that a proposed amended Complaint had not been attached to the Motion and that there was a complete absence of information as to what, if any role Dow had played in the alleged injury and what, if any, role they were going to assume in the lawsuit.

Moreover, Defendant, due to the Court's acting in haste, was unable to point to authority warning District Judges to be

aware of collusive efforts by Plaintiffs to obtain Remands back to their formerly selected forum; or to argue that the

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delay inherent in a remand to Wayne Circuit, should be seriously considered by the District Judge because the very purpose for the general prohibition against review of remand orders, i.e., to avoid delays, is foiled under such circumstances. Finally, Defendant was unable to present arguments that explicit language in Fed. R. Civ. P. 19(a) forbids addition of even an indispensable party who presence destroys diversity jurisdiction but rather only permits the Court to determine whether to continue with the action without the party or to dismiss the action as provided for in Fed. R. Civ. P. 19(b). 28 U.S.C. Rule 19.

The Court elected to rule immediately, (A-76 to A-79) stating the issue was whether to allow the amendment to add Dow. (A-77). It then stated that if the Amendment was allowed, "it destroys diversity and the case would automatically be remanded to Wayne Circuit Court." In a one and one-half page Opinion, the District Court extracted from, and focused in upon language in the Moore's citation provided by defense counsel to the effect that an amendment to add a nondiverse party should not be granted unless the party is indispensable or there are strong equities in favor of amendment. The Court concluded these two conditions were to be read in the disjunctive and that he felt there were "strong equities" favoring amendment. Acknowledging the total inadequacy of the Motion to Amend to demonstrate how Dow Chemical was implicated, the Court stated that Dow was not an indispensable party but would be indispensable if they were responsible for the Plaintiff's injuries. The District Court concluded that "the equities -

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favor allowing such an amendment so that in one lawsuit a proper fact finder can in due course make a determination with everyone in front of it." Judge Gilmore then granted the

Amendment and stated "I will remand the case to the Wayne County Circuit Court."

On September 27, 1982, Judge Gilmore entered a "form" order of Remand to Wayne Circuit Court. Cursory perusal reveals that the word "Wayne" was typed into a blank space on the Order form relating to which Circuit Court the case was being remanded, and that the words "lacking total diversity" were added after the form's standard language regarding absence of jurisdiction (A-80).

This Order, it is respectfully submitted, in no way reflects the content of the District Judge's consideration, and Opinion of September 23, 1982 regarding Amendment and Remand. For example, the Order states the "case was improvidently removed" but there was absolutely *nothing* in the Opinion (or in the entire record of the case) to even intimate that the District Judge considered the improvidence of removal, either at the time the case was removed or at any other time! Similarly, the Order states that "there is no federal jurisdiction . . . lacking total diversity" but the Opinion no where discussed or even mentioned the word jurisdiction; the Court simply said that *if* he permitted the Amendment diversity would be destroyed and the case would automatically be remanded. The only items really discussed in relation to remand are totally absent from the Order; to-wit, the "strong equities" in favor of amendment or the discussion regarding Dow not being an in-

dispensable party or that, in any event, there was no need to show such to grant the amendment.

Counsel for the Defendant had intended on contesting, in presentment of order proceedings, any proposed order from Plaintiffs' counsel which did not exactly conform to the Court's September 23, 1982 Opinion and ruling. Indeed, counsel ordered a transcript of those proceedings on an expedited basis to see to that end. Counsel followed this course precisely because of the apparent importance the facial content of such

orders bear upon attempts to obtain relief from them in this Court and in the Supreme Court. Moreover, counsel also wanted to be able to present the District Court with those arguments and points he was forestalled from making by its truncation of the proceedings prior to the Court's taking the apparently irrevocable step of signing the order.

However, counsel was once again foiled by the District Judge's unorthodox abridgements of the normal adversarial processes. Apparently, in an effort to get the matter removed from the docket with all possible haste, perhaps even to accomplish this by the end of the month of September, the District Judge did not wait for a proposed order from Plaintiffs' counsel — much less the conclusion of presentment proceedings — but rather, on his own, entered the September 27, 1982 "form" order. It should also be noted that in the haste, at least of this date, no order granting the amendment was ever entered.(A-1 to A-6; Docket Sheet).

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Finally, defense counsel would point out that they never were served a copy of the Order of remand. Only by virtue of the preparation of this Petition did counsel secure a copy of that Order by obtaining the same from the Clerk's office of the Eastern District of Michigan.

This Court (and Respondent) should also be aware that prior to filing this Petition for Mandamus, counsel for Defendant seriously contemplated seeking Reconsideration of the Remand Order pursuant to E.D. Mich. Rule 17(k) and Fed. R. Civ. P. 60(b) in order to bring to the attention of Judge Gilmore all of those arguments and points discussed above which Defendant did not have an opportunity to present to him. Under 'normal' conditions, the circumstances of this case would be taylor-suited to a motion for reconsideration. *See,* E.D. Mich. Rule 17(k)(3). However, given the fact that the remand Order comes arguably within the pale of 28 U.S.C. §1447(d)'s prosription, counsel noted specific authority that, if not precluding

Reconsideration, counseled an immediate filing of a Petition for a Writ of Mandamus as opposed to seeking Reconsideration. *In Re Weaver,* 610 F2d 335 ,336 & n.3 (5th Cir. 1980). *See also Three J. Farms, Inc.* v *Alton Box Board Co.,* 609 F2d 112, 115 (4th Cir. 1979); *In re LaProvidencia Development Corp.,* 406 F2d 251 (1st Cir. 1969).

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STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

I.

THE DISTRICT COURT'S RULING WHICH DOES NOT PURPORT TO BE PREDICATED UPON THE GROUNDS FOR REMAND PERMITTED BY 28 USC §1447(c) AND WHICH MOREOVER IS AFFIRMATIVELY PREDICATED ON GROUNDS WHOLLY DIFFERENT FROM THOSE DESCRIBED THEREIN IS SUBJECT TO REVIEW BY THIS COURT BY MANDAMUS AND MUST BE VACATED

This Petition presents difficult questions regarding the power and jurisdiction of a United States Court of Appeals to correct clearly improper and abusive conduct by a District Court Judge, primarily because that abuse arises in the context of a Remand proceeding. Petitioner concedes that the statutes of the United States do not provide it with a right to appellate review of this Remand Order but do argue that extraordinary relief, pursuant to the All Writs Act, 28 USC §1651, in the nature of mandamus, is within the prerogative powers of this Court. *Thermtron Products* v *Hermansdorfer,* 423 US 336 (1976).

The Petitioner also acknowledges that 28 USC §1447(d) generally prohibits review of remand orders by "appeal or otherwise," which, in most instances, in mos tances precludes review by mandamus as well. However, in *Thermtron*

Products, the Supreme Court construed 28 USC §1447(d) in *pari materia* with 28 USC §1447(c), describing under what circumstances remand is warranted, and concluded "that only remand orders issued under §1447(c) invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under §1447(d)." *Therm-*

tron Products v *Hermansdorfer*, 423 US at 346. In fact the court specifically noted that,

> We are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

Id. at 351.

Clearly, such occurred in the context of this case. Judge Gilmore without even a recitation of the Statute or mention of the ground permitting remand therein, concluded "strong equities" favored joinder of a non-diverse, non-indispensable party — grounds wholly unrelated to those recognized by 28 USC §1447(c), but apparently justifiable to him. In fact, the Fifth Circuit Court of Appeals has recognized that a remand based upon joinder of a non-diverse, non-indispensable party constitutes improper grounds for removal warranting vacation by writ of mandamus:

> Perhaps it can be persuasively argued that the language of §1447(c) allows the district judge to consider on a motion for remand the additions after removal of indispensable parties *but no other parties*, . . .
>
> [W]e cannot ascertain from the district judge's order whether he based his remand on the clearly proper ground that Smuts and McDowell [non-diverse persons] are indispensable parties or *on the clearly improper ground* that although they are not indispensable

parties joinder (and hence remand) was nevertheless called for . . . .[8]

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In re Merrimack Mut. Fire Ins. Co., 587 F2d 642, 646-47 (5th Cir 1978).

Although that Court went on to deny the writ because of the noted ambiguity in the order, the *Merrimack* Court did explicitly recognize by footnote that permitting joinder of a non-indispensable, non-diverse defendant clearly was outside of the District Court's discretion, and that such an exercise of discretion was one outside the exclusive grounds of 28 USC §1447(c) and hence a remand predicated on such grounds would be reviewable by mandamus. *Id.* at 647 & n8[4]. The majority of federal courts addressing this underlying or related issues have concluded that such joinder is clearly improper when it defeats federal jurisdiction.[5]

In fact, the Fifth Circuit has restated the importance of the question "squarely presented" in this Petition when it recently declared," [w]e reserve for decision when the issue is squarely presented whether a district court may allow joinder of an non-diverse party who is not indispensable even though such joinder may result in remand. *"IMFC Prof.* v *Latin Am. Home Health,* 676 F2d 152, 159 n.14 (5th Cir 1982). Additionally, the position of the Fifth Circuit, found in footnote eight (8) of *In re Merrimack,* was specifically adopted by the Seventh Circuit when it held that remand based upon discretionary grounds not found in 28 USC §1447(c) were subject to review by the Court of Appeals by mandamus and must be vacated. *Ryan* v *State Bd. of Elections of State of Ill.,* 661 F2d 1130, 1133 (7th Cir 1981).

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If all the factors are considered, the present matter presents a much stronger case than that which *In re Merrimack* suggests warrants issuance of the prerogative writ. First, unlike

the Court's finding of an ambiguous order in *In re Merrimack*, here Judge Gilmore explicitly held Dow not to be an indispensable party and further, as the syntax of his ruling indicates, found such distinctions irrelevant since there existed "strong equities in favor" of amendment. There is absolutely nothing in the remand statute, 28 USC §1447(c), even remotely resembling grounds for remand, due to "strong equities" favoring addition of parties whose non-indispensable presence destroys otherwise perfectly proper jurisdiction.

It should also be noted that although the District Court did mention the word "diversity" (it never spoke of jurisdiction) in its ruling such was a fait accompli. If "strong equities" favored amendment to destroy diversity, diversity would be "destroyed"— pure and simple — and the case would "automatically" be remanded. There was not a single word of discussion or inquiry into the fact that the presence of federal jurisdiction and the providence of removal, by the very terms of §1447(c), are measured by the state of affairs as to diversity at the time the Petition for remand was filed. *See, e.g., St. Paul Mercury Indemn. Co.* v *Red Bar Cab*, 303 US 283 (1938); *In re Carter*, 618 F2d 1093, 1101 (5th Cir 1980), *cert denied*, 450 US 949 (1981); *Brown* v *Eastern States Corp.*, 181 F2d 26, 28 (4th Cir), *cert denied*, 340 US 864 (1950); *Perimeter Lighting, Inc.* v *Karlton*, 456 F.Supp. 355, 359-60 (N.D. Ga. 1978); Wright, *Federal Courts* §38, at 134 (2d ed 1970). Neither did the District Court attempt to discredit or distinguish such time honored authorities, nor did it suggest or attempt to justify

considering post-removal events as within the purview of §1447(c).

Indeed, by its discussion of allowing the amendment in view of "strong equities"—this "destroying diversity" "automatically"— the District Court acknowledged that federal jurisdiction was entirely proper and present! Cf. *Ryan* v *State Bd. of Elections*, 661 F2d 1130, 1333 & n.3 (7th Cir 1981). Absolutely nothing

exists in the ruling of the Court, the Motions or Briefs of the Plaintiffs, or the arguments of counsel to indicate that Judge Gilmore was acting, in any fashion, pursuant to §1447(c) or that he found that "it appears that the case was removed improvidently and without jurisdiction when he made his ruling on September 23, 1982. *Compare Chesapeake & Ohion Bay Co.* v *U.S. District Court*, Slip. Op. (6th Cir. No. 82-1155 May 21, 1982) (where the District Judge relied upon the moving papers of the Plaintiff discussing the improvidence of remand).

Moreover, completely unlike *In re Merrimack* or any other reported decision, the parties here were actually still diverse at the time the Court entered its Order of Remand on September 27, 1982. No written Order had been entered at that time (or at anytime subsequent to Defendant's knowledge) permitting the Amendment of the Complaint, nor had the Plaintiffs filed their Amended Complaint. Dow Chemical Company, the alleged non-diverse Defendant, was not before the District Court even as a named, but unserved Defendant. Therefore, the District

Judge not only improperly found that remand should follow when "equity" required the addition of a non-diverse, non-indispensable party, but also, in fact, remanded the case where all of the parties presently before it were diverse—i.e., Plaintiffs and Chevron. Therefore, even the untenable ground for the remand—that "equity" required the non-indispensable but non-diverse Dow Chemical's presence in the suit—did not in fact exist when the Remand Order was entered! Even if the Order granting the Amendment had been entered subsequent to the Remand Order, such would not only have been irrelevant to ascertaining the state of diversity at the 'moment of remand' but also void for want of jurisdiction. Once the remand was entered, the District Court lost jurisdiction to the State Courts.

Apparently, the District Judge entered his own Remand Order on September 27, 1982, (without the participation of counsel as to whether such comported with his ruling of Sep-

tember 23, 1982) to clear the matter from his overcrowded docket by the end of the month (at which time the District Judges are required to file a monthly report with the Director of the Administrative Office of the United States Courts. *See generally,* 28 USC §604(a)(2). This concern over an over crowded docket was precisely the rationale utilized by Judge Hermansdorfer in *Thermtron,* and the Supreme Court characterized it as "wholly unauthorized grounds" for remand warranting review and vacation by mandamus. Under the authority of *Thermtron,* Petitioner would submit that the actions of, the rulings upon, and the Order of Judge Gilmore regarding

remand are subject to the review of this Court by Writ of Mandamus.

Your Petitioner is aware that *Thermtron Products, Inc.* v *Hermansdorfer,* is not the most recent decision of the United States Supreme Court addressing the reviewability of remand orders by mandamus. In *Gravitt* v *Southwestern Bell Tel. Co.,* 430 US 723 (1977), the Court apparently 'narrowed the opening' created by *Thermtron, see also Volvo Corp. of America* v *Schmarzer,* 429 US 1331 (1976) (in Chamber Opinion of Circuit Justice Rehnquist), or as Judge Hill said in dissent in *Southwestern Bell,* the Court intends to stay on "the narrow bridge . . . constructed in *Thermtron.*" *In re Southwestern Bell Tel. Co.,* 542 F2d 297, 298-300 (5th Cir 1976) (Hill J. dissenting), *rev'd sub. nom., Gravitt* v *Southwestern Bell Tel. Co.,* 430 US 723.

Most of the Court of Appeals, (including this Court) have taken this as a signal from the Supreme Court that unless "the order does not clearly rely on reasons other than those permitted under the statute," i.e., 28 USC §1447(c), "the remand order cannot be reviewed." *Chesapeake & Ohio Rwy Co.* v *U.S. District Court,* — Slip op. at 2 — (6th Cir. No. 82-1155 May 21, 1982). *See also State Farm Mut. Aut. Ins.* v *Baasch,* 644 F2d 94, 96 (2nd Cir. 1981); *In re Weaver,* 610 F2d 335, 337 (5th Cir

1980); *In re Greyhound Lines Inc.*, 598 F2d 883, 884-84 (5th Cir 1979); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642, 647 (5th Cir 1978), *See also Levy* v *Weissman*, 671 F2d 766, 769 & n.9 (3rd Cir 1982). *See also* Note, *Remand Order Review After Thermtron*, 1977 Ill L. Forum 1086, 1103-04. In doing this, the

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Courts of Appeals have taken the curt words of the Supreme Court in *Gravitt* to mean that only in the rarified and exceptional case where the District Judge neither mentions the statute or standards of remand of §1447(c), and thereafter affirmatively states grounds for reversal not contained therein, is an order for remand subject to review under the All Writs Act, 28 USC §1651, by mandamus.

Some of the Courts have stated it somewhat differently focusing in on restrictive language appearing in *Thermtron* and, at least to their understanding, adhered to and reiterated in *Gravitt:* "if a trial judge *purports* to remand a case on the ground that it was remanded 'improvidently and without jurisdiction,' his order is not subject to challenge in the Court of Appeals . . . ." *Royal* v *State Farm Fire & Cas. Co.*, 585 F2d 124, 126 (5th Cir 1982), *citing, Thermtron Products Inc.* v *Hermansdorfer*, 423 US at 343 (emphasis in *Royal*).

Despite such restrictions and anathemas, however, the Courts of Appeals subsequent to *Gravitt*, have, with a concomitant frequency, issued writs in the nature of mandamus compelling District Judges to vacate orders of remand. *See, e.g., Levy* v *Weissman*, 671 F2d 776 (3rd Cir 1982); *In re Shell Oil Co.*, 631 F2d 1156 (5th Cir 1980); *In re Carter*, 618 F2d 1093 (5th Cir 1980), *cert denied*, 450 US 949 (1981); *In re Greyhound Lines, Inc.*, 598 F2d 883 (5th Cir 1978). *See also, Ryan* v *State Bd. of Elections of State of Ill.*, 661 F2d 1130 (7th Cir 1981); *Merrill, Lynch, etc.* v *Gayden*, 637 F2d 391, 356 n. 9 (5th Cir 1981); *Three J. Farms, Inc.* v *Alton Box Bod. Co.*, 609 F2d 112 (4th Cir 1979) (mandamus appropriate to vacate vacation of remand); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642

(5th Cir 1978) (although writ would not lie in case regarding ambiguous order, clearly improper grounds of remand after allowing amendment of non-diverse, non-indispensable party would warrant using writ).

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Given the convolutions of the state of the law in this area, it is difficult for litigants and the Court of Appeals to determine when review by mandamus is authorized and appropriate and when it is not. The Eleventh Circuit has recently come up with a workable and simplified description of what presently appears to be the limits of the Appeal Courts' authority:

> It thus appears that where we are specifically forbidden to review action by a district judge when the judge is authorized to act, *it may, nevertheless be our duty to decide whether or not the action was, indeed, authorized.* Erroneous action taken within authority may not be corrected; *unauthorized acts may be curbed.*

Meadows v *United States*, 665 F2d 1009, 1012 (11th Cir 1982) (emphasis supplied).

All of the above-referenced authorities, Petitioner would submit, establish that Judge Gilmore's ruling does not constitute mere erroneous acts committed within the pale of authority, but rather was a wholly unauthorized act affirmatively predicated on grounds entirely foreign to 28 USC §1447(c). The District Judge neither cited the remand statute nor did he purport to act pursuant to or attempt to enumerate grounds remotely resembling the standard for remand, i.e., that the case was removed improvidently and without jurisdiction. The grounds he did give for removal, however, were wholly unrelated to 28 USC §1447(c) — i.e. that "strong equities" required addition of a non-diverse, non-indispensable party who, *in fact*, was not formally added or before the Court, in any way, at the time the case was remanded! Moreover, it appears the District Judge remanded the case in haste to lighten his docket, a ground explicitly unacceptable by Supreme Court precedent.

Clearly, therefore, under *Thermtron, Gravitt* and relevant Court of Appeals decision, the ruling of the District Judge is reviewable by this Court under the All Writs Act and the Order of Remand should be vacated.

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II.

THE DISTRICT COURT'S ENTRY OF A FORM ORDER OF REMAND ON SEPTEMBER 27, 1982 WHICH DID NOTHING MORE THAN RECITE THE WORDS "IMPROVIDENTLY REMOVED" AND "THERE IS NO FEDERAL JURISDICTION," BUT WHICH IN FACT DID NOT REFLECT THE CONTENT, SUBSTANCE OR TENOR OR THE COURT'S RULING OF SEPTEMBER 28, 1982, IS SUBJECT TO REVIEW BY THIS COURT BY MANDAMUS AND MUST BE VACATED

Arguendo, this Court rejects the contentions of the Petitioner that the ruling and remand of the District Judge are subject to review by writ in the nature of mandamus, Petitioner further contends that the entry of an order of remand by the District Judge on September 27, 1982 which was thoroughly dissimilar to the content, substance or tenor of the Court's ruling on September 23, 1982 in itself (or in conjunction with those contentions) constitutes a severable and separate abuse of discretion reviewable by mandamus. Although it is respectfully submitted, it is nevertheless forcefully submitted that the September 27, 1982 Order is a sham, or at best an order entered by gross oversight.

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The Order is a form Order parroting language from the remand statute. The words, "It appearing that the within case was improvidently removed to the United States District Court for the Eastern District of Michigan," are found as "boiler plate," standard form language in the Order, yet there

is absolutely nothing in the Court's September 23, 1982 ruling, counsels' argument or the moving papers of the Plaintiff even intimating improvident removal. Similarly, standard form language "it appearing that there is no federal jurisdiction in the above-entitled matter" with the words "lacking total diversity" typed in thereafter, does not comport in the slightest with the then present posture of the case, the Court's rulings or even with Plaintiff's moving papers. (Indeed, Plaintiffs contended that Dow Chemical had to be served before the case would be remanded) (A-71 to A-72). The Court, in its ruling, never even mentioned the word "jurisdiction" — much less the relevant statute and standard for remand — and only spoke of the "destruction of diversity" as a fait accompli.

Lest this characterization lead to the misunderstanding that this was an erroneous, but nevertheless unreviewable finding of no jurisdiction, it is essential to note that the Court acknowledged the presence of diversity jurisdiction prior to considering the motion to remand! Indeed, if that very admittedly proper jurisdiction was capable of being "destroyed", such was

only attainable by virtue of the District Judge exceeding his authority under 1447(c), and 28 USC Rules 19, 20 and 21, by ordering amendment to include the non-indispensable, non-diverse party and thereby, himself, creating a discretionary, non-statutorily recognized ground for removal. In any event, the form language of the Order does not, in the least, reflect the content of the Court's ruling regarding the proper presence, and then the apparent destruction of diversity jurisdiction by the Court's own actions. Additionally, the Order contains nothing reflecting the real bases for the remand — i.e., the totally discretionary, and arbitrary finding that "equity" required the amendment.[6] Finally, as has been noted above, the Order claims the case "lacks diversity" when *in fact* the Order of Amendment has never been entered. In that respect alone, more than ministerial oversight or simple err is involved —

this hasty entry constituted the Court's attempt, irrespective of whether Dow was before it, to divest its docket of one more case. By so acting, the District Court did not merely compound its err, it implemented one unauthorized act by committing another.

Ironically, the very grounds the Petitioner asserts constitutes a separate ground warranting the use of mandamus — the entry of an Order that does not in the least comport with the District Judge's ruling — is sadly said to be an item which might preclude review of any of his actions in this matter.

Some of the Courts of Appeals, in dicta, and in recognition of what is thought to be compelled by *Gravitt,* have often stated that a mere recitation of §1447(c), or of the grounds therein, automatically insulates a remand order from review

irrespective of what the Judge has ruled or based his ruling upon. *See Royal* v *State Farm Fire & Cas. Co.*, 685 F2d 124, 126-27 (5th Cir 1982); *In re Merimack Mut. Fire Ins. Co.,* 587 F2d at 648 ("District Court invocation of §1447(c) will preclude review of a remand order no matter how clearly erroneous the order appears in its face"); *Robertson* v *Wall*, 534 F2d 63, 65 (5th Cir 1976).

Various scholars have also stated it more vividly, and more caustically:

> [A] district court apparently can insulate its remand order from any review under *Thermtron* by mechanically invoking the §1447(c) grounds for remand.

Note, *Remand Order Review After Thermtron Products,* 1977 Ill. L. forlum 1086, 1106.

> *Southwestern Bell* is particularly disappointing in that the Supreme Court placed emphasis exclusively on rote recitation of language and gave no consideration to the erroneous decision-making process underlying the remand order.

Meyers, *Federal Appellate Review of Remand Orders: Expansion on Eradication?* 48 Miss. L. J. 741, 754 (1977).

> Apparently, a remand order which so much as mentions "improper removal" will be precluded from review. Even mandamus will not lie to prevent a judge from remanding for reasons completely irrelevant to 1447(c) grounds, as long as his order recites "improper removal."

Ridle, *Federal Courts: Review of the Remand Order,* 9 St. Mary's L. J. 274, 285-86 (1977).

Petitioner recites this state of affairs and understanding of the law if only to demonstrate the absurdity of the position. As irony is within irony, mere recitation of the proposition establishes its meretriciousness. Courts and scholars find it unpal-

atable that the utterance of a talisman by one person can render the actions of that person, irrespective of the circumstances or the extent of arbitrariness, wholly immune from review or alteration. Moreover, although the "magic word" understanding of unreviewability might be an educated, but exaggerated extrapolation of Supreme Court precedents[7], it is apparent that such is merely dicta or conjecture, as the question has never been faced full front. That issue however feared by Justices and Judges, discussed by scholars and eluded to in footnotes, is squarely presented here — i.e., the reviewability of a pre-fabricated, form fashion remand order which merely recites §1447(c) grounds but which, in fact, was predicated or wholly different and improper grounds.

Justice Rehnquist recited the issue and the answer to it aptly enough in his dissent in *Thermtron:*

> [W]hat if the district court does state that it finds no jurisdiction, using the rubric of §1447(c), but the papers plainly demonstrate such a conclusion to be absurd? Are potential challengers to such an order entitled to seek the aid of the court of appeals, first to demonstrate that the order entered by the lower court was a sham

> and second to block that order pursuant to today's decision. If the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open to potential opponents of orders of remand.

Thermtron Products Inc. v *Hermansdorfer,* 423 US at 357 (Rehnquist, J., dissenting).

Scholars who have considered the matter are harmonious that such a sham order must be reviewable.

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> The ineffectiveness of precluding review by evaluating only the face of a remand order seems clear. If the district judge in Thermtron, who remanded because of a crowded docket, had simply stated in the order that the case had been "improperly removed," his action would have been nonreviewable under the apparent logic of the per curiam decision in Southwestern Bell. The purpose of mandamus is to correct discretionary abuse. If such abuse may be precluded from review simply by masking the remand order as being pursuant to "improper removal," the avenue of appeal opened in Thermtron becomes virtually nonexistent.

Ridle, *Federal Courts: Review of the Remand Order,* 9 St. Mary's L. J. 274, 286 (1977). Indeed, it appears that Judge Hermansdorfer attempted to convince the *Thermtron* Court that his Order was based on §1447(c), and hence by negative implication, the argument that such an Order is non-reviewable must fail. Brief and Appendix of Respondent at 3, *Thermtron Products, Inc.* v *Hermansdorfer,* 423 US 336 (1976).

Perhaps the argument would not be so strong, nor the abuse of discretion so obvious in this case had the District Judge entered its Order after Presentment proceedings. The parties would have had an opportunity — albeit perhaps a futile one — to discuss the terms of the Court's September 23, 1982 ruling and the intentions of the Court as to how to memoralize

that ruling in order form. His sua sponte entry of the Order of Remand on September 27, 1982, however, precluded such from occurring. The continued efforts of the District Judge to abort the normal machinations of the adversarial process make the abuse of discretion inuring in this outrageous Order beyond peradventure.

Petitioner in making this submission is not unaware that a difficulty arises as to balancing the statutory language of

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§1447(d) and its underlying policy forbidding appellate review, with ever present need of the Court of Appeals and the Supreme Court to correct abusive uses and usurpations of power by District Judges. In this case, however, there can be no question as to the preponderations of such a balancing. To foreclose review by mandamus under such circumstances, not only works to emasculate *Thermtron* and the effectiveness of this great prerogative writ to correct injustice, but rewards such abuse if it is accompanied by hollow recitations. Invariably, therefore, your Petitioner contends that *arguendo* the remand ruling is not reviewable, the entry of this sham Order of Remand must be corrected by mandamus. Indeed, this idea has been stated succinctly by yet another scholar joining the ananimous ranks of those criticizing any rule precluding review of form or sham remand Orders:

> A considerable amount of responsibility must reside in the wide discretion of a federal district court's exercise of remand powers, and certainly must courts will properly consider the issues and order accordingly. When the district court errs in its order of abuses its discretion, there is no sound basis for precluding appellate review. While the potential for delay is the very basis for limiting appeals, the district judge in *Thermtron* who sought to lessen delay was soundly reversed.
>
> Of more importance is the elimination of dissatisfaction by the general public with our system of jurisprudence,

a goal which can best be accomplished by reducing the possibility for error and increasing the likelihood of uniformity of decisions. Congress should seriously consider repeal or amendment of the removal statutes to allow appellate review of remand orders. *In the interrim the judiciary should, at a minimum, reduce the complexity of this issue by inquiring through mandamus into the ground underlying those remands which do nothing more than recite the "improvidently removed" and "without*

jurisdiction" language. Such a policy may result in the ultimate reduction of delay in the federal courts and even the elimination of unnecessary litigation. It will certainly have the salutary consequences of abrogating the abuses which permeate this area of the law and ultimately advancing the interests of justice.

Meyers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?* 48 Miss. L. J. 741, 754 (1977) (emphasis added). *See also Petition of Henneman,* 137 F2d 627 (1st Cir 1943) (mandamus will lie to determine if district judge has passed on all grounds in removal petition in issuing remand).

III.

THE DISTRICT COURT'S CONDUCT IN RELATION TO THE MANNER AND MEANS OF REMANDING THIS ACTION TO THE STATE COURT SO AS TO DEPRIVE THE DEFENDANT OF THE SUBSTANTIAL FEDERAL RIGHT OF REMOVAL WITHOUT DUE PROCESS OF LAW IS SUBJECT TO REVIEW BY THIS COURT BY MANDAMUS AND THEREBY WARRANTS VACATION OF THE REMAND ORDER PREDICATED UPON SUCH CONDUCT

Finally, Petitioner must not discuss only the content of the District Court's Remand Ruling and Order, but the manner in

which it arrived at those results. Your Petitioner submits there was a breakdown of the adversary processes in relation to the remand so as to deprive it of the most rudimentary aspects of due process of law.

Without belaboring this argument with a reiteration of the undisputable factual scenario discussed above, it is adequate to state the District Judge, one day after transfer of the case to his docket and one day after the filing of the Motions to Amend and for Remand, orally ordered the parties to appear for a Remand Hearing to be conducted the following day. In

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fact, at the time defense counsel was informed of this by phone, he had yet to receive the Plaintiffs' moving papers. Less than twenty four hours later, after having no opportunity to adequately prepare much less file papers in opposition, defense counsel appeared for the single purpose of requesting time to respond. Ignoring this request, the District Judge Granted the Motion to Amend and for Remand, all within two (2) days of the filing of those Motions and the assignment of the case to him. (Indeed, such did not even constitute enough time for Defendant to constructively receive notice of the Motions by mail. Fed. R. Civ. P. 6(e)). By acting so impetuously the Trial Judge precluded the Defendant from presenting arguments regarding the untimeliness and insufficiency of the Plaintiffs' Motions, as well as authorities and arguments to the effect that the District Courts' are without authority to so act. In a haste to exorcise the matter from his docket, the District Judge extracted himself from the adversarial process.

By this abbreviation, he deprived the Defendant of a substantial right to a federal forum specifically bestowed upon the Defendant by Act of Congress. 28 USC §1441(a); *Thermtron Products, Inc.* v *Hermansdorfer,* 423 US 336 (1976); 14 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure §3721 (1976). Or at the very least, he deprived Defendant of the right to a full and fair hearing in the manner of being

deprived of such a right. Our system of jurisprudence finds such one-sided arguments, truncation of proceedings and ill-advised short cuts singularly abhorrent, if only because they

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deprive the system of its adversarial tone, an essential quality derived through centuries of legal and social evolution.

> The policy underlying the modernization of federal procedure . . . [was] the abandonment or relaxation of restrictive rules which prevent the hearing of cases on their merits.

Jackson v *Beech*, 636 F2d 831, 835 (D.C. Cir 1980), *citing*, *H.F. Livermore Corp.* v *Aktiengesellschaft Gebruder Loepfe*, 432 F2d 689, 691 (D.C. Cir 1970). *See also Seven Elves, Inc.* v *Eskenazi*, 635 F2d 396, 403 (5th Cir 1981) (truncated proceedings not favored). Ironically, application of local rules 17(g) and the Rules of Civil Procedure here would have inhibited the Defendant's being denied due process because had they been operative, Defendant could have properly responded to the matters raised by the Plaintiffs' Motions. Rather, it was the abandonment of the Rules of fair play by the Court that precipitated the injury in this context.

The Courts of Appeal have recognized this fundamental principle when they have vacated dismissals, judgments or orders based upon improper notice of proceedings. *Klapprott* v *United States*, 335 U.S. 601, 615 (1949). In *Buckeye Callulose Corp.* v *Bragger Elec. Const.*, 569 F2d 1036 (8th Cir 1978) the Court vacated a judgment wherein none of the parties received notice pursuant to Rule 77(d) from the Clerk in time to pursue an Appeal. *See also Fleming* v *Gulf Oil Corpo.*, 547 F2d 908 (10th Cir 1977) (vacation of judgment of dismissal without proper notice to Plaintiff and improper alteration of the record

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subsequent to dismissal by the district judge to include items not formerly ruled upon); *Keegel* v *Key West & Caribbean Trading Co.*, 627 F2d 372, 374-75 (D.C. Cir 1980) (where trial

judge, concerned about his docket, hastily defaulted party, appeals court set the same aside in recognition of universal preference for trial on the merits); *Wilson* v *Moore & Assoc. Inc.*, 564 F2d 366 (10th Cir 1977) (failure to provide 3 days notice of application for default fatally defective to default judgment); *Fidelity & Deposit Co. of Maryland* v *USA Form Hail Pool Inc.*, 523 F2d 744, *cert denied*, 425 US 950 (1976) (proper to vacate order of judgment entered without notice to diligent attorney who sought to know status of case regularly and was assured by court that he would be notified in time to perfect appeal of 12 year old case).

Although these cases arise in the context of vacation or alteration of final judgments or dismissals, all of these authorities and basic fairness apply with equal force to the abbreviation of these proceedings.[8] Indeed, it can be said that in view of the District Court's attempt to avoid review of his conduct by entering an "insulated order," it is even more compelling that the cavalier and hasty treatment afforded Defendant's should be subject to mandamus review.

If this conduct were not enough to establish the non-adversarial and unconstitutional characteristics of the District Judge's conduct in this matter, one need only look at what happened subsequent to the Remand Hearing. As noted, Defendant adamantly intended on pursuing Presentment of Order -

Proceedings (1) in an effort to insure the grounds for remand that appeared plainly reviewable by mandamus were not expanded upon in an Order so as to preclude review and (2) to make arguments and present authorities precluded by the abbreviation of the original hearing. Again, as noted, the District Judge's eagerness to enter an Order before the end of September aborted the adversarial process. Had the advocates been present or permitted to have input as to the Order's form they would not only have been able to demonstrate how the record bore absolutely no resemblance to the language of the

Order that was entered but also that no order granting that amendment had ever been entered and that therefore the parties then before the Court were still diverse. Finally, the process was again forestalled when the Clerk failed to provide counsel with a copy of the Remand Order as required by Fed. R. Civ. P. 77(d). The only way counsel learned of the Remand Order was by review of the docket sheet in preparation for this Petition.

In view of the foregoing, it seems obvious the Petitioner was denied due process in the loss of a substantial federal right of removal via the District Judge's conduct. This alone should permit vacation of the Remand Order by Writ of Mandamus, if only out of recognition of the notion "that supervisory control of the District Courts [by the court of Appeal] is necessary to proper judicial administration in the federal system." *LaBuy* v *Howe Leather Co.*, 352 US 249, 259-60 (1957). *See Swindell-Dressler Corp.* v *Dumbauld*, 308 F2d 267 (3rd Cir 1967) (mandamus used to vacate order when party denied due process in not being afforded proper hearing). Indeed, the pat-

ent denial of due process when considered either independently from, or in conjunction with the grounds in Parts I and II *supra*, renders the right of Petitioner to relief by issuance of the writ clear and compelling.

CONCLUSION

Your Petitioner has presented to this Court the conduct of the District Judge which it believes to unquestionably warrant issuance of the Writ of Mandamus to correct. (Indeed this is the first such Petition which the law firm representing Petitioner has ever sought against a District Judge). In the process, your Petitioner has candidly ackowledged the general unreviewability of such orders by virtue of an Act of Congress 28 USC §1447(d), and also the present state of the law regarding under what limited circumstances that statute is not oper-

ative. Notwithstanding these difficulties, for the reasons discussed above, this Court is vested with full authority to correct the wrongs before it. Professor Moore put it aptly when he noted that "[t]he jurisdiction" of the Court of Appeals, as that term is used in §1651, must include the power of the Courts of Appeals to insure that District Courts are in fact Courts and not schools of solipsism."[9]

Moreover, the history of the great prerogative writ of mandamus is said to have its origins in that clause of the Magna Charter that declares "nulli vendemus, nulli negabimus, aut differemus rectum vel justitian" — to none will we sell, to none will we deny, or delay equity or justice. Magna Charta, Cl. 40. *See* T. Tapping, *The Law & Practice of the High Prerogative*

Writ of Mandamus 56 (1853). Indeed, the evolution of the common law writ of mandamus in England and its advent and use in this country illustrate that it is not something lightly limited or abrogated. It is not surprising, therefore, that what was noted long ago regarding that writ is still apposite today. "Mandamus or mandatory writs are very ancient, as old as Edward the First, if not older; and the two main ends of them are to expedite justice and to prevent oppression in great bodices of men." *Rex* v *The Chancellor of Cambridge University* (*Dr. Bently's Case*), Fortescue 202, 204; 92 E.R. 818, 819 (K.B. 1723).

Regarding ancient authorities as they are relevant to this case, perhaps the words of Lord Mansfield, spoken over two hundred years ago, are most appropriate.

> [The Petitioner] has a right to come here for this writ, this great prerogative writ of mandamus (a remedy which turns more, in my opinion, upon principle than upon precedent;) and we ought to grant it, because there is no other adequate remedy.

Rex v *Vice-Chancellor of Cambridge University* (*Earl of Hardwicke's Case*), 3 Burr 1648, 1660; 97 E.R. 1027, 1033

(1765) (Mansfield, L.J.). This assertion was made in response to the argument that the matter being considered was more properly within the province of Cambridge University by the Statutes of Elizabeth than the Courts — something like statutory unreviewability. Perhaps the concurrence of Lord Mansfield's Brother, Mr. Justice Wilmot, most artfully articulated the notion that AngloAmerican jurisprudence always secures

a means — often by mandamus — of remedying judicial or quasi-judicial abuse.

> If there is a clear right in Lord Hardwicke, the Court ought . . . to find out a suitable and adequate remedy; and . . . even to have made a precedent, if they could not have found one: for where there is a right, law and justice require that there should be some remedy or other . . . .

Id., (Wilmot, L.J.).

Certainly the Congress intended the writ to be continued to implement these ancient and noble purposes when it enacted the All Writs Act, 28 USC §1651. *United States* v *Hagman*, 342 U.S. 205 (1952). Neither can its general prohibition against review of remand orders codified in 28 USC §1447(d) be construed as emasculating the geat prerogative process of this Court to correct clearly abusive, indeed unconstitutional behavior of the District Judge simply because such arose in the Remand context. To do so would be to cripple one of the greatest means of insuring a sensible and fair administration of justice and enunciate an interference by Congress (which it never intended) into Article III functions solely within the prerogative of the Federal Courts.

This case requires review by this Court pursuant to the All Writs Act in the nature of Mandamus. To turn a phrase, "strong equities" compel it.

WHEREFORE, Petitioner prays this Honorable Court

grant its Petition for Writ of Mandamus and the Relief requested therein.

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RESPECTFULLY SUBMITTED
BUSHNELL, GAGE, DOCTOROFF & REIZEN

BY: _____
GEORGE E. BUSHNELL, JR. (P11472)

BY: _____
NOEL A. GAGE (P13786)

BY: _____
CARL J. MARLINGA (P17102)

BY: _____
JOHN K. PARKER (P29563)
Attorneys for Petitioner
3000 Town Center, Suite 1500
Southfield, Michigan 48075
(313) 444-4848

DATED: October 14, 1982

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FOOTNOTES

[1]The Court also permitted the Amendment; thereafter the Plaintiffs filed their Amended Complaint (A-67 to A-69). Those amendments, as is apparent, are not relevant to this Petition.

[2]It should be noted that counsel for the Defendant never received a True Copy of this Order and never knew it had been entered. Hence reference is made to the Docket Sheet.

[3]The Motions did find their way to the office of defense counsel's law firm in the afternoon of September 22, 1982, but did not reach Mr. Marlinga's desk until after he had spoken to the clerk. Mail is distributed by the Postal Service twice daily to the building wherein counsel's offices are located — once in the morning and once in the afternoon — and correlatively, support staff distribute the mail twice — once in the morning and once in the afternoon. Mr. Marlinga obtained the papers with the second, or afternoon mail distribution on September 22, 1982.

It should also be noted that the constructive notice provisions of Fed. R. Civ. P. 6(e) would extend the time defense counsel was deemed to have even received the moving papers until September 23, 1982 (3 days from mailing) or more likely September 24, 1982 (3 days from filing as Plaintiffs posted the papers prior to actual filing).

[4]Footnote eight (8) of the *In re Merrimack* case reads as follows:

> The Bank argues that even if Smuts and McDowell are not indispensable, it lay within the disrict judge's discretion to allow their joinder even though it destroyed diversity. All of the authorities cited supporting this proposition pre-date *Thermtron*, see *Harper Fin. Corp.* v *Hanson Oil Corp.*, 403 F.Supp. 1405 (W.D. Tenn. 1975): *Ingersoll* v *Pearl Assurance Co.*, 153 F. Supp. 558 (N.D. Cal. 1957); 1A Moore's Federal Practice 0.161[1], at 209 (2d ed. 1974); and *Thermtron* makes it clear that such discretion is not vested in the district judge. As discussed above, *Thermtron* holds that §1447(c) states the exclusive grounds on which a remand order may be based. The "improvidently" language of §1447(c) evidently was not read by the court to vest discretion in the district court. The Court stated: "We are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling stat-

> ute." 423 U.S. at 351, 96 S. Ct. 1t 593, 46 L.Ed. 2d at 554. Second, prior to the 1948 revisions of section 1447(c), "improper' was used rather than "improvidently." The Thermtron court considered the substitution of words in 1447(c) to be of "no moment." Id. at 350 n.15, 96 S.Ct. at 592, 46 L.Ed.2d at 553-54. While "improvidently" may have connotations of discretion, "improper" contains no such overtones. Third, that a writ of mandamus was used to correct the district court error in *Thermtron* suggests that the District Court is not vested with discretion under §1447(c), for traditionally mandamus will not lie to correct an abuse of discretion but only to order a ministerial act. *Work* v *U.S. ex rel. Rivers*, 267 U.S. 175, 177, 45 S.Ct. 252, 69 L.Ed. 561, 562 (1925). We conclude that a district court may remand a case as being "improvidently" removed only if one of the statutory, non-jurisdictional requirements for removal has not been satisfied. See *Haelan Laboratories, Inc.* v *Topps Chewing Gum, Inc.*, 131 F.Supp. 262 (E.D. N.Y., 1955); note 3 supra.

In re Merrimack Mut. Fire Ins. Co., 587 F2d at 647 n. 8.

[5]The majority of Federal District Courts and Circuit Courts of Appeal apparently having addressed the question have held that after a proper removal (as ascertained at the time of remand), the District Court has no discretion (and/or that it is improper) to add a non-diverse, non-indispersable party and then remand. *See, e.g., IMFC Prof* v *Latin Am. Home Health*, 676 F2d 152, 159 n.14 (5th Cir 1982) (issue should be squarely addressed); *Ryan* v *State Bd. of Elections*, 661 F2d at 1333 & n.3 (no remand for discretionary grounds); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d at 647 n.8 (See note 4 & accompanying text *supra*); *Chiodo* v *General Waterworks Corp.*, 380 F2d 860, 867 (10th Cir 1967) (additions of even indispersable party cannot be joined if would destroy the jurisdiction of the court and if indispersable cannot be joined court should dismiss action); *Reynolds* v *Wabash R.R. Co.*, 236 F2d 387 (8th Cir 1956) (no power in federal district judge to add non-diverse party who would destroy jurisdiction); *Thorp* v

Petrola, 81 F.R.D. 513, 515-16 (N.D. W. Va 1979) (not only cannot non-indispensable parties not be added but neither can non-diverse indispensable parties be added; construction of explicit language of Rule 19, 20 and 21 control over Rule 15; "if the court were to allow the adding or dropping of parties pursuant to a motion under Rule 15, which would deprive the court of subject matter jurisdiction, the policy of Rules 19, 20, and 21 would be emansulated merely by ignoring it."); *Skinner* v *American Oil Co.,* 470 F.Supp. 229, 235 & n.2 (S. D. Town 1979) (attempt to join non-diverse Defendant following remand irrelevant for purpose of determing whether to remand; indeed, because of Rule 19 improper to add such a Defendant); *Perimeter Lighting Inc.* v *Karlton,* 456 F. Supp. 355, 359-60 (N.D. G. 1978) (removability determined at the time of remand petition filing and acknowledges authority prohibiting amendment of non-diverse party after proper removal); *Barrett* v *McDonald's of Okla. City,* 419 F.Supp. 792, 793 (W.D. Oklahoma 1976) (Court should ignore addition of non-diverse party by Plaintiff because removal is viewed at time petition is filed); *Harper Fin. Corp.* v *Hanson Oil Corp.,* 403 F.Supp. 1405, 1407 (W.D. Tenn. 1975) (amendment not permitted to add non-diverse Defendant unless amendment also substantially alters the very nature of the cause of action); *Fort Howard Paper Co.* v *Affiliated F.M. Ins. Co.,* 60 F.R.D. 62, 63-64 (E.D. Wis. 1973) (Court must protect Defendant's right to removal and not allow amendment to include parties whose presence could oust the Court of jurisdiction); *Alexander* v *Lancaster,* 330 F. Supp. 341, 343 (W.D. La. 1971) (attempts to join any non-diverse party after proper removal irrelevant to remand — must view diversity only at times of removal); *Checker Motors Corp.* v *Chrysler Corp.,* 39 F.R.D. 37, 38 (S.D. N.Y. 1965) (to bring in parties by Amendment, Rule 13(b) requires that there presence not defeat the Court's jurisdiction); *Pacific Gas & Elec. Co.* v *Fireboard Prod. Inc.,* 116 F.Supp. 377 (N.D. Cal. 1953) (removal's propriety determined at time of removal and any conflict in Rule 15 regarding amendment must be considered with specific language in other rules precluding destruction of jurisdiction, remand to add non-diverse party not allowed). *See also Television Receipt Corp.* v *Dunkan,* 426 F2d 174, 177 (6th Cir 1970) (federal removal jurisdiction not defeated by events occurring subsequent to commencement of action).

There are authorities subsequent to *Thermtron* that have held that under some circumstances remand subsequent to removal by virtue of the addition of non-diverse parties is appropriate. Petitioner submits these authorities are clearly erroneous in view of the fact that *Thermtron* itself forbids discretionary remand and because none really deal with the explicit language of Congressionally mandated policy expresed in 28 USC Rule 19, 20 & 21. Indeed, it would appear that explicit language in Rule 19 regarding indispensable parties states they cannot be added if their presence would "deprive the Court of jurisdiction over the subject matter." The only thing the District Court can do is dismiss the action. *Skinner* v *American Oil Co.,* 470 F.Supp. 229, 233-34 (S.D. Iowa 1979).

Notwithstanding this, however, the contra authorities are thoroughly inapposite here because, first, the District Judge did not make even the slightest intimation that he was referring to, or relying upon them. Secondly, the

District Judge here explicity relied upon the discretionary ground that "strong equities" required joinder, while none of the contra authorities have *ever* articulated such a discretionary and non-statutory ground for remand without a thorough weighing of the adverse jurisdictional effects, contra authorities, and the possibility of collusive jurisdiction. Thirdly, most of the cases permitting remand have not discussed the indispensable/dispensable

distinction, whereas Judge Gilmore stated that Dow was not indispensable (and/or that distinction was irrelevant). *Soam Corp.* v *Trame Co.,* 506 F.Supp. 302 (S.D. N.Y. 1980); *Littlefickl* v *CNA,* 475 F.Supp. 887 (C.D. Cal. 1979); *Miller* v *Davis,* 464 F.Supp. 458 (D.D.C. 1978). Fourthly, some of the Courts have said an amendment that defeats diversity should not be granted unless it also includes a substantial alteration of the nature of the cause of action something clearly not involved here. *Miller* v *Davis,* 464 F.Supp. 458, 460 (D.D.C. 1978); *Harper Finc. Corp.* v *Hanson Oil Co.,* 403 F.Supp. 1405, 1407 (W.D. Tenn. 1975). Finally, the few courts which have erroneously concluded that permissive joinder of a non-diverse, non-indispensable party have explicitly predicated their exercise of such *discretionary* power upon a very careful consideration of whether the requested amendment is but a collusive means of obtaining return to the forum formerly selected by Plaintiff. *Desert Emp. Bank & Ins. Co. of No. Am.,* 623 F2d 1371, 1376 (9th Cir 1980); *Shaw* v *Mumford,* 526 F. Supp. 1209, 1215 (S.D. N.Y. 1981).

There is absolutely nothing in this record to establish that Judge Gilmore considered such important factors. Therefore, even under application of these authorities Petitioner contents are erroneous — authorities of which the District Court was totally unaware — and which are at the farthest edge of discretion's praceipe, Respondent's actions are not only erroneous, but clearly abusive of discretion.

[6]Indeed if the authorities discussed in note 4, 5 *supra* & accompanying text are considered, an argument can be made that a remand predicated upon grounds in contravention of the congressionally mandated policies embodied in 28 USC Rule 19, 10 & 21, as well as 28 USC §1447(c), is a remand predicated in contravention of, and upon grounds wholly different from the remand statute, 28 USC §1447(c), thereby subject to review.

[7]Petitioner submits that such a position is also not established by, and indeed is inconsistent with the *Gravitt* v *Southwestern Bell* case — the case from which it is supposedly to have arisen. There the Trial Judge was under the mistaken belief that the citizenship of the Defendant was conclusively established by state law so as to make the removal, at the time of removal, improvident due to incomplete diversity. The Supreme Court thereby reversed the Fifth Circuit for issuing a Writ of Mandamus stating, without elaboration, that the District Judge's Order was plainly within 1447(c) limits. No Order, however, reciting in forum fashion §1447(c) grounds wholly incongruent with the District Court's ruling, existed in *Gravitt.* Neither did any such order appear in those Court of Appeals cases which declared *in dicta* such orders were unreviewable by virtue of *Gravitt.*

As a matter of fact, *Thermtron* (and the Court's recognition of it in *Gravitt*) still stands for the fundamental principle of mandamus jurisdiction that "a traditional use of the writ in aid of appellate jurisdiction has been to confine

an inferior court to Defendants lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Thermtron Products, Inc.* v *Hermansdorfer*, 423 US at 352; *Rocke* v *Evaporated Milk Ass'n.*, 319 US 21, 26 (1943). Unquestionably, when a judge attempts to gloss over a ruling that is clearly unauthorized by recitation of form language that is to legitimize that ruling, such should be subject to review by mandamus. Hardly a clearer abuse of discretion is conceivable.

Another point is worth noting. It would be a major Congressional encroachment on the inherent Article III powers of the superior federal judiciary to review by mandamus unauthorized acts of inferior judges, if by virtue of Acts of Congress such judges could deliberately seek refuge from review of their actions and the Acts of Congress were said to preempt review by writ notwithstanding such improper purposes. As Justice Rehnquist noted in dissent in *Thermtron Products, Inc.* v *Hermansdorfer*, 423 US at 354, the power of Congress to limit the appellate jurisdiction of a court it has created is not debatable, *Sheldon* v *Sill*, 8 How 441 (1850), but such certainly has no place in consideration of the Supreme Court's power of review by prerogative writ or otherwise. Such powers (as well as the Court of Appeals supervisory powers) are founded upon wholly different grounds, i.e., grounds inherent in Article III and which are self-effectuating.

[8]Defendant would note that Rule 60(b) relief applies to an "order" as well as final judgments. Fed. R. Civ. P. 60(b). Moreover, to the extent that the District Court's conduct denies a litigant due process the underlying constitutional principles appearing in the Rule 60(b) cases can be applied per force.

It should also be noted that unlike the due process arguments rejected in a case involving review of a remand order, *Three J. Farms, Inc.* v *Alton Box Board Corp.*, 609 F2d 112, 116 (4th cir 1979), Petitioner did not have an 'opportunity here to voice its opposition to the remand motion! *Id.* at 116. There, the Plaintiffs filed a Motion for Remand on August 16, 1978 and "properly served" the same on defense counsel. *Id.* at 114, 116. On August 29, 1978 Defendants filed a Motion for Stay but apparently did not respond to the Motion for Remand. Nearly a month later, on October 13, 1978, the District Court entered a Remand Order after apparently conducting a hearing without defense a counsel. The Fourth circuit said that "[i]t is clear that the Defendants had an opportunity to voice their opposition to the remand motion, *and their failure to do so*, whether due to the Courts inadvertence or otherwise, does not, in our opinion, raise any constitutional questions." *Id.* at 116.

By contrast, Defendant here had less than twenty four hour notice of the hearing before it was to appear at the hearing. Indeed, the Plaintiffs pleading had barely reached Defendant, and given the constructive operation of

Fed. R. Civ. P. 6(e), there would have been yet one more day *after* the actual remand hearing before Defendants would have been deemed to have even received the Motion! It can hardly be said, in this context, that Defendant failed to properly voice its opposition when it *in fact*, had no opportunity to do so. Therefore, by parity of reasoning, *Three J. Farms* buttresses Petitioner's due process contentions.

[9] 9 J. Moore, Moore's Federal Practice, Paragraph ¶110.28, at 306.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Chevron Chemical Corporation's Petition for Writ of Mandamus together with the Appendix was served upon the following:

Honorable Horace W. Gilmore
235 Federal Building
Detroit, Michigan 48226
Robert A. Tyler, Esquire
1220 Ford Building
Detroit, Michigan 48226

by depositing same in the United States Mail at Detroit, Michigan on the 14th day of October, 1982.

Further, the original and four (4) copies of this Petition and Appendix were filed with John P. Hehman, Clerk for the Sixth Circuit Court of Appeals on this date by mailing same via express mail.

EDNA M. LINDSEY

Subscribed and sworn to before me this
14th day of October, 1982

NOTARY PUBLIC

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United States District Court
For The Eastern District of Michigan
802 U.S. Courthouse
Detroit, Michigan 48226
October 22, 1982

Chambers of
HORACE W. GILMORE
District Judge

(Received October 23, 1982)

Mr. John P. Hehman
Clerk, United States
Court of Appeals
516 U.S. Post Office
& Courthouse
Cincinnati, Ohio 45202

RE: Case No. 82-8063; In Re Chevron Chemical Company, Petitioner; District Court No. 81-70555

Dear Mr. Hehman:

I have reviewed Chevron Chemical Company's petition for writ of mandamus and find it to be without merit. I will not respond to the legal issues, which I believe are well covered by 28 U.S.C. §1447(d), but I do want to clarify some of the facts in this case which were not pointed out by the petitioner.

What actually happened here is fairly simple. This case was transferred to me from Judge Cohn on September 20, 1982, when Judge Cohn disqualified himself. I immediately received plaintiff's emergency motion for a protective order (docket entry No. 64). This motion sought to postpone depositions scheduled for September 22, 1982. I felt obligated to resolve this issue as soon as possible.

In the motion, it was plaintiff's position that the deposition should be adjourned until the motions concerning adding Dow Chemical as a party could be decided. It was petitioner's opinion that the depositions should not be adjourned. In their answer to a motion for protective order, the petitioners stated, "Chevron *does* object, however, to a wholesale adjournment of the depositions until such time that a hearing can be had on plaintiff's motion to add Dow Chemical as a party." (emphasis added).

Given the immediacy of the pending objections and petitioner's objection to any adjournment until October 18, I felt that the best way to resolve the dispute was to decide the issue of whether to add Dow Chemical as a party. This was the only effective way to resolve the emergency motion for a protective order pending before me. Therefore I heard the motion to add Dow on September 23, 1982.

Mr. John P. Hehman
October 22, 1982

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At that time, neither party had any objection to this procedure, and, in the emergency motion, plaintiff stated that petitioner was aware of the intent to add Dow as early as July 21, 1982.

There was full oral argument of the motion on September 23, 1982, in which petitioner made all the arguments it now asserts against adding Dow and against remand. Both parties were fully heard, and my decision was based upon a full consideration of all arguments. At no time did any party state that it was unprepared to proceed, and had any party claimed that it was unprepared to proceed, I would have granted an adjournment.

After I granted the motion to add Dow, which I felt was clearly in my discretion because of the claims made by the plaintiff, diversity was destroyed. I therefore proceeded to remand the case, as this Court no longer had any jurisdiction.

The reliance of petitioner on *Thermtron Products* v. *Hermansdorfer,* 423 U.S. 336 (1976), where the judge remanded a case after stating he was doing so because of an overcrowded docket, and because plaintiff's right of redress was being severely impaired, is misplaced. Petitioner offers not the slightest basis in fact to establish the relevance of that case here, nor is there any.

I believe that the entire petition is simply an attempt to avoid the command of 28 U.S.C. §1447(d), which prohibits review of remand orders by appeal or otherwise.

Yours very sincerely,

/s/ Horace W. Gilmore
U.S. District Judge

HWG:mep
cc: Bushnell, Gage
Doctoroff & Reizen

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: CHEVRON CHEMICAL COMPANY,
Petitioner. CASE NO.

RESPONDENT'S OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS WITH
STATEMENT OF RELIEF REQUESTED

The Respondents, MARIE E. MUNN and GEORGE A. MUNN, through their attorneys, BLEAKLEY & TYLER, P.C., hereby declare their opposition to the Petition For Writ of Mandamus and request this Court to deny said Petition, thereby allowing the September 27, 1982 Order of Remand to stand, as issued by the Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, in the case of MARIE E. MUNN and GEORGE A. MUNN vs. CHEVRON CHEMICAL COMPANY, civil action number 81-70555, and further allowing this matter to remain in the Wayne County Circuit Court where it was originally filed.

STATEMENT OF FACTS

Respondent agrees with the opening remark of Petitioner in its recital of the facts: The facts pertinent to Chevron's Peti-

tion are painfully simple. This is a product's liability action in which it is alleged that products manufactured by defendant Chevron caused numerous lung abnormalities in plaintiff George A. Munn, including the terminal carcinoma from which Mr. Munn died. On July 21, 1982, the deposition of Chevron's employee, Dwight K. Maloney, was taken. At that deposition Mr. Maloney testified that the products in controversy contained a compound known as "Silvex", manufactured for Chevron by Dow Chemical Company, a corporation with its principal place of business in the State of Michigan. Mr. Maloney further testified that Silvex contained a substance known as Dioxin, a chemical known to be carcinogenic to human beings and animals.

Prior to this deposition, plaintiffs had forwarded interrogatories to defendant Chevron. These interrogatories requested information concerning suspected carcinogens in the subject products. Defendant Chevron replied that neither the subject products, nor components thereof, were suspected of being carcinogenic. Prior to the deposition testimony of Mr. Maloney, plaintiffs were unaware that Dioxin was contained in defendant's products or that Dow Chemical Company was involved in the manufacture of defendant's products.

Subsequently, plaintiffs filed a Motion For Leave To Amend for the purpose of adding Dow Chemical Company to the lawsuit. On September 27, 1982, the Honorable Horace W. Gilmore of the United States District Court for the Eastern District of Michigan granted said Motion. For the reason that Dow Chemical Company is a corporation with its principal place of business in the State of Michigan, Judge Gilmore remanded the lawsuit to the Wayne County Circuit Court where it had been originally filed. The addition of Dow Chemical Company destroyed the diversity of citizenship upon which defendant Chevron's Removal Petition was grounded. This lawsuit involves no "federal questions".

ARGUMENT

Since the case was lacking both the diversity of citizenship and federal questions necessary for exercise for subject matter jurisdiction in the Federal District Court, Judge Gilmore's Order of Remand was proper.

Mandamus is an extraordinary remedy utilized to compel the performance of a public official's ministerial duty where the movant has a clear and undisputable right to the issuance of such a writ. No new rights can be acquired through such a writ, the purpose of which is to enforce rights already vested. *Will* v *United States,* 389 U.S. 90 (1967). In order to grant a Writ of Mandamus the movant must establish a clear right to the relief requested, a plainly defined duty on the part of the public official to perform the act in question and the unavailability of other adequate relief. *Holmes* vs. *United States Board of Parole,* 541 F.2d 1343 (7th Cir. 1976). A Writ of Mandamus is to issue only in extraordinary circumstances amounting to a "judicial usurpation of power". *Kerr* v. *United States District Court, Northern District, California,* 426 U.S. 394 (1976). Judge Gilmore's Order of Remand was couched in the only terms provided for in 28 U.S.C. 1447(c). It is clear, however, that the Court had no choice but to remand the case to state court once

it allowed for the amendment adding a party destroying diversity jurisdiction. *Wallace* vs. *Knapp-Monarch Company,* 234 F.2d 853 (8th Cir. 1956); *Highway Construction Co.* vs. *McClelland,* 15 F.2d 187 (8th Cir. 1926), *cert. den.* 273 U.S. 765 (1927). Under settled Federal Law it is evident that the exercise of a sound discretion in the District Court may permit a new party to be added even though its citizenship destroys diversity and requires a remand. *Littlefield* vs. *Cas. Co.,* 475 F. Supp. 887 (C.D. Calif. 1979); *Harper Financial Corp.* vs. *Hansom Oil Corp.,* 403 F. Supp. 1405 (W.D. Tenn. 1975); *Ingersoll* vs. *Pearl Assurance Co.,* 153 F. Supp. 558 (N.D. Calif. 1957). As the petitioner points out, the instances in which the amendment to

add diversity destroying parties have typically been kept to a minimum. Generally, there are two justifications for the permission of such an amendment after removal. Petitioner has identified only one of those, that being the addition of an indispensable party which destroys diversity of citizenship. The other instance in which such an exercise of discretion is justified is when there are strong equities in favor of the proffered amendment. *Ingersoll* vs. *Pearl Assurance Co.*, 153 F. Supp. 558 (N.D. Calif. 1957); 1A Moore's Federal Practice §56.07 (2d ed. 1982). The Honorable Judge Gilmore's reference to the "strong equities" favoring amendment here, although criticized by the Petitioner as being unfounded, is indeed based upon the law and accepted practices of the Federal District Bench.

Since the Court's decision with respect to amendment is discretionary, and since that discretion was properly exercised in this instance, there is no basis for the issuance of a Writ of Mandamus. For the reasons stated above, the Respondent respectfully urges this Court to deny the Petition for Writ of

Mandamus as sought by the Chevron Chemical Company.

Respectfully submitted,
BLEAKLEY & TYLER, P.C.

BY: _____
ROBERT A. TYLER (P 25404)
and

BY: _____
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DATED: 10/29/82

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO.

IN RE: CHEVRON CHEMICAL COMPANY,
Petitioner,
/

ALTERNATIVE PETITION FOR WRIT OF MANDAMUS WITH STATEMENT OF RELIEF REQUESTED

NOW COMES Petitioner, CHEVRON CHEMICAL COMPANY, by and through its attorneys, BUSHNELL, GAGE, DOCTOROFF & REIZEN, and Petitions this Honorable Court to either, A) issue a Writ of Mandamus to the United States Court of Appeals for the Sixth Circuit compelling it to direct the Respondent, THE HONORABLE HORACE W. GILMORE, United States District Judge for the Eastern District of Michigan, 1) to vacate his Order of September 27, 1982, remanding the case of *Marie E. Munn and George E. Munn* v *Chevron Chemical Company*, Civil Action No. 81-70555, to the Wayne County Circuit Court and 2) to either restore said action to the docket of the United States District Court for the Eastern District of Michigan or to dismiss it altogether; or alternatively to B) issue the Writ of Mandamus directly to Respondent compelling him to do the same.

This Petition is brought pursuant to 28 USC §1651 or otherwise and Rule 27 of this Court. As grounds and reasons for why the writ should issue, Petitioner incorporates by reference those grounds asserted as justifying this Court issuing a writ of *certiorari* in the Petition for a writ of

certiorari filed contemporaneous herewith and to which this Petition is offered in the alternative.

RESPECTFULLY SUBMITTED,
BUSHNELL, GAGE, DOCTOROFF & REIZEN

BY: _____
GEORGE E. BUSHNELL, JR. (P11472)

BY: _____
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DATED: January 10, 1983

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Office Supreme Court, U.S.
FILED
JUL 8 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1486

CHEVRON CHEMICAL COMPANY,
a Delaware Corporation,
Petitioner,

vs.

HON. HORACE W. GILMORE,
United States District Court Judge
for the Eastern District of Michigan,
Respondent.

PLAINTIFF'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

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THE INLAND PRESS, DETROIT, MICHIGAN

COUNTER-QUESTION PRESENTED

I.

SHOULD THE COURT ALLOW REVIEW OF A CASE WHICH HAS BEEN REMANDED PURSUANT TO 28 USC §1447(c) BY PRESENTMENT OF A "SHAM" ARGUMENT IN ATTEMPT TO AVOID 28 USC §1447(d)?

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United States District Court Judge
for the Eastern District of Michigan,
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PLAINTIFF'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

STATEMENT OF THE CASE

This is a product liability action filed on behalf of Marie E. Munn and George A. Munn on February 13, 1981 in Wayne County Circuit Court. At the time it was filed it was alleged that products manufactured by defendant, Chevron Chemical Company, caused abnormalities in plaintiff, George A. Munn, including terminal carcinoma, from which Mr. Munn died on March 27, 1981. The case was removed to the United States Federal District Court, for the Eastern District of Michigan, by defendant, Chevron.

On July 21, 1982 the deposition of Chevron's employee, Dwight K. Maloney, was taken. At that deposition Mr. Maloney testified that the products in controversy contained a compound known as "Silvex", manufactured for Chevron by Dow Chemical Company. Dow Chemical Company is a corporation with its principal place of business in the State of Michigan. Mr. Maloney further testified that Silvex contained a substance known as Dioxin, a chemical known to be carcinogenic to human beings and animals.

Prior to this deposition plaintiffs had forwarded interrogatories to defendant, Chevron, on October 1, 1981. These interrogatories were finally answered by Chevron on April 19, 1982. These interrogatories requested information concerning suspected carcinogens in the subject products. Defendant, Chevron, replied that neither of the subject products, nor components thereof, were suspected of being carcinogenic. The applicable interrogatory is as follows:

> "Question 6: Please identify which, if any, of the above products have been suspected of having a carcinogenic effect upon living beings, animal or human, indicating the appropriate time frame when first suspected, names and addresses of individuals conducting said investigations or studies or tests that led to the suspicion, type of carcinoma suspected to be associated with said product.
>
> Answer to Question 6: Neither Weed-B-Gon neither Weed and Feed have been suspected of having a carcinogenic effect upon living beings."

Prior to the deposition testimony of Mr. Maloney plaintiffs were unaware that Dioxin was contained in defendant's products or that Dow Chemical Company was involved in the manufacture of defendant's products.

Based upon the new information, plaintiff filed a motion on or about September 21, 1982 for leave to amend their complaint for the purpose of adding Dow Chemical Company and to remand the lawsuit to the Wayne County Circuit Court, as

a result of the lack of diversity, if the amendment was granted.

The case was transferred from Judge Cohn to Judge Gilmore because of apparent stock ownership. On September 27, 1982, the Honorable Horace W. Gilmore of the United States District Court for the Eastern District of Michigan granted said motion. For the reason that Dow Chemical Company is a corporation with its principal place of business in the State of Michigan, Judge Gilmore remanded the lawsuit to Wayne County Circuit Court where it had been originally filed. The addition of Dow Chemical Company destroyed the diversity of citizenship upon which defendant, Chevron's removal petition was grounded. This lawsuit involves no federal questions.

REASONS WHY THE WRIT SHOULD NOT ISSUE

Since the case was lacking both the diversity of citizenship and federal questions necessary for exercise of subject matter jurisdiction in the Federal District Court, Judge Gilmore's Order of Remand was proper.

Mandamus is an extraordinary remedy utilized to compel the performance of a public official's ministerial duty where the movant has a clear and undisputable right to the issuance of such a writ. No new rights can be acquired through such a writ, the purpose of which is to enforce rights already vested. *Will* v *United States*, 389 U.S. 90 (1967). In order to grant a Writ of Mandamus the movant must establish a clear right to the relief requested, a plainly defined duty on the part of the public official to perform the act in question and the unavailability of other adequate relief. *Holmes* v *United States Board of Parole*, 541 F.2d 1343 (7th Cir. 1976). A Writ of Mandamus is to issue only in extraordinary circumstances amounting to a "judicial usurpation of power." *Kerr* v *United States District Court, Northern District, California*, 426 U.S. 394 (1976). Judge Gilmore's Order of remand was couched in the only terms provided for in 28 USC §1447(c). It is clear, however, that the Court had no choice but to remand the case to state court once

it allowed for the amendment adding a party destroying diversity jurisdiction. *Wallace* v *Knapp-Monarch Company*, 234 F.2d 853 98th Cir. 1956); *Highway Construction Co.* v *McClelland*, 15 F.2d 187 (8th Cir. 1926), cert. den. 273 US 765 (1927). Under settled Federal Law it is evident that the exercise of a sound discretion in the District Court may permit a new party to be added even though its citizenship destroys diversity and requires a remand. *Littlefield* v *Cas. Co.*, 475 F. Supp 887 (C.D. Calif. 1979); *Harper Financial Corp.* v *Hansom Oil Corp.*, 403 F. Supp. 1405 (W.D. Tenn. 1975); *Ingersoll* v *Pearl Assurance Co.*, 153 F. Supp. 558 (N.D. Calif. 1957). As the petitioner points out, the instances in which the amendment to add parties destroying diversity have typically been kept to a minimum. Generally, there are two justifications for the permission of such an amendment after removal. Petitioner has identified only one of those, that being the addition of an indispensable party which destroys diversity of citizenship. The other instance in which such an exercise of discretion is justified is where there are strong equities in favor of the proffered amendment. *Ingersoll* v *Pearl Assurance Co.*, 153 F. Supp. 558 (N.D. Calif. 1957); 1A Moore's Federal Practice §56.07 (2d ed. 1982). The Honorable Judge Gilmore's reference to the "strong equities" favoring amendment here, although criticized by the Petitioner as being unfounded, is indeed based upon the law and accepted practices of the Federal District Bench.

Since the Court's decision with respect to the amendment is discretionary, and since that discretion was properly exercised in this instance, there is no basis for the issuance of a Writ of Mandamus. It is clear that despite the knowledge of Chevron that they filed false answers to interrogatories with respect to the carcinogenic effects of the products. This is clearly evident by interrogatories which they have subsequently answered.

On November 11, 1982 plaintiff filed supplemental interrogatories to defendant, Chevron, third set. Chevron answered

these interrogatories on March 21, 1983. The pertinent interrogatory is as follows:

> "Question 33: When did the defendant first learn that the chemical "dioxin" was suspected of being carcinogenic to human beings or animals?
>
> Answer 33. The carcinogenic potential of "dioxin" (TCDD: 2,3,7,8-tetrachloro-dibenzo-p-dioxin) has recently been demonstrated in laboratory animal investigations. There appears to be some controversy as to the findings in some of the studies. Chevron Environmental Health Center was aware of the results of these investigations when they were completed in the late 1970's."

It, therefore, appears that the company who manufactured the cancer-producing ingredient of defendant Chevron's products was not a party to the lawsuit until after Judge Gilmore's order allowing the amendment of the complaint. It is within the Court's discretion when there are strong equities in favor of the amendment to allow such amendment. Based upon the intentional non-disclosure of the carcinogenic effect of the element of the product, in previous answers to interrogatories, and the fact that the company that manufactured the carcinogenic agent was not a defendant, the strong equities would point toward allowing the amendment. Once the amendment is allowed, diversity is destroyed and the case is properly remanded to the Wayne County Circuit Court.

The greatest injustice which could be done would be to grant the petitioner's petition in this case. What has occurred is that petitioner has intentionally filed false answers to interrogatories, five and a half months after they were due; accuse plaintiff of filing the motion to amend simply to avoid the timetables imposed by the Federal Court; wrongfully accused Judge Gilmore of entering a "sham" and "form" order simply to clear his docket when there is no basis to support same; all in an attempt to avoid the clear statement of 28 USC §1447(d). The factual basis as contained in *Thermtron Products, Inc.* v

Hermansdorfer, 420 US 923 (1975), is not applicable to the present situation.

The Court properly remanded the matter to the State Court under 28 USC 1447(c).

The Order of the United States Court of Appeals for the Sixth Circuit is clearly proper.

For all of the reasons stated above, plaintiff respectfully urges this Court to deny the Petition for Writ of Certiorari or in the Alternative for Writ of Mandamus, as sought by Chevron Chemical Company.

Respectfully submitted,

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